(C) in the hearing the physician involved has the right—

(i) to representation by an attorney . . .

42 U.S.C. § 11112(B)(3)(C)(i) (App., *infra*, 79a-82a).

California law provides in relevant part, "The peer review body shall adopt written provisions governing whether a licentiate [undergoing peer review disciplinary proceedings] shall have the option of being represented by an attorney at the licentiate's expense." Cal. Bus. & Prof. Code § 809.3(c) (App. 77a-78a).

STATEMENT OF THE CASE

Petitioner Mileikowsky held medical staff privileges for fourteen years at the Encino-Tarzana Regional Medical Center ("Hospital"). He began his practice at the Hospital in 1986 and his privileges were renewed continuously until 1999. *Mileikowsky*, 128 Cal. App. 4th at 537-38 (App., *infra*, 4a). He was an outspoken member of the staff and was disliked by some administrators for that reason, as he did not shirk his responsibility to publicize administrative shortcomings at the Hospital that undermined patient care. *See id.* at 538 n.5 (App. 5a) (Mileikowsky was criticized for "bringing court reporters to committee meetings").

In 1999, the Hospital stated that Petitioner was no longer on staff because he had not filed a timely application for reappointment. *See id.* at 537-38 (App. 4a). The Hospital, in fact, had not provided him with an application form or ever notified him that it was due, and his failure to reapply was inadvertent. *See id.* Petitioner successfully sued to obtain a preliminary injunction enabling him to continue to treat his patients there. *See id.* at 538 (App. 4a-5a). The Hospital continued, however, to attempt to deny privileges to Petitioner. *See id.*

In 2000, Petitioner spoke out about the improper destruction of three embryos and agreed to testify against the Hospital in a case of battery and medical malpractice. Declaration of Gil Mileikowsky filed June 28, 2000 (App. 93a-104a). Petitioner also reported the additional, improper destruction of the embryos of two other couples (Admin. Rec. 7821-91). Petitioner's testimony on behalf of patients posed a risk of economic harm to the Hospital, so it retaliated by eliminating Petitioner from the medical staff through the pretext of a peer review proceeding. On November 16, 2000, the Hospital summarily suspended Petitioner's privileges, even though he posed no threat of harm to patients. *Mileikowsky*, 128 Cal. App. 4th at 539 (App. 7a).

There were only two Hospital complaints against Petitioner concerning his recent treatment of patients, and both were clearly pretextual.[1] The Medical Hearing Committee established for the purpose of evaluating such complaints never made an adverse finding against Petitioner. First, the Hospital argued that Petitioner performed a circumcision that resulted in excessive bleeding. But the hospital's own "expert" physician had discharged the infant immediately after examining him, thereby demonstrating that there was no serious injury. (Hearing Record, Correspondence from Dr. Mileikowsky, Vol. III, Exh. 150). Moreover, the "expert" had never once performed a circumcision himself. His testimony directly conflicted with that of another expert at the Hospital. One claimed that too little skin had been removed, while the other complained that too much skin had been removed. (*Id.*) This could not justify a summary suspension of medical staff privileges.

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[1] A litany of picayune allegations, nearly all of which were more than five years old, were also tacked on by the Hospital and recited by the court below. *Mileikowsky*, 128 Cal. App. 4th at 538 n. 5 (App., *infra*, 5a). If "leaving a 1998 meeting after only a few minutes" were truly a serious offense, *id.*, then no physicians would be practicing at the Hospital.

The other medical charge against Petitioner was even sillier. Allegedly Petitioner departed from a hospital guideline for nurses, not physicians, in applying a vacuum multiple times to a patient and in requesting fundal pressure. (Hear'g Tr. Nov. 12, 2001, pp. 1751-52, 1774-76). Once again, there was no harm to the patient, who thrived under Petitioner's care, and independent reviewers confirmed that Petitioner's medical work was well within the standard of care. There was nothing to support a summary suspension in this complaint, and other non-medical allegations were likewise contrived.

As conceded by the Hospital in the proceedings below, a summary suspension of medical staff privileges that lasts more than 30 days essentially destroys a physician's career. Specifically, the Chief Operating Officer of the Hospital, Gerald Clute, admitted that he must report a summary suspension to the National Practitioner Data Bank (NPDB), accessible by hospitals nationwide. (Hear'g Tr. Sept. 24, 2001, pp. 825-29). Clute essentially acknowledged that any physician who applied for privileges with such a report in the NPDB would be rejected, and other hospitals would do likewise. The NPDB operates as a virtual blacklist that is used by prospective employers and hospitals to exclude physicians. Potential employers use the NPDB to reject applicants; hospitals use it to deny applications for hospital privileges. The NPDB can be more harmful to a physician's career than spending time in jail.

The summary suspension of Petitioner was without a prior hearing, but California law recognizes the property interest and provides for a post-suspension hearing, which began in January 2001. However, Petitioner was denied counsel at this hearing pursuant to Cal. Bus. & Prof. Code § 809.3(c) and the medical staff bylaws, and thus was forced to represent himself—a task for which he had no training or skill, and for which high emotion posed an additional obstacle. *See*

Mileikowsky, 128 Cal. App. 4th at 541, 557-58 (App. 9a, 31-33a). When the substantive sessions ultimately began, the Hospital's parent company, Respondent Tenet Healthsystem ("Tenet"), arranged for numerous early terminations of the proceeding, preventing Petitioner from ever addressing the merits of the controversy. *See id.* at 548 (App. 18a-19a). The excuses for each adjournment varied, ranging from obtaining documents for Petitioner which he said he could do without, to another excuse that members of the Hearing Committee "need to get some sleep." *See id.* at 548 n.12 (App. 18a-19a). When the hearing officer Daniel Willick, *who previously served as an attorney to the Hospital*, threatened to adjourn yet another hearing session early, Petitioner observed that the hearing officer appeared "ready to adjourn before we started." The hearing officer responded to that tame observation by abruptly and permanently adjourning the hearing. The officer then refused to schedule any more hearings, thereby depriving Petitioner of a hearing on the merits.

Respondent's pretextual explanations for terminating the hearing made no sense. Former Hospital counsel and hearing officer Willick cited a communication by Petitioner to the Medical Hearing Committee, claiming that it was *ex parte* even though all parties received that communication. Failing that, Respondent claimed that Petitioner should not have communicated with the Committee at all. On the one hand Respondent denied Petitioner counsel on the basis that the hearing should be informal, yet on the other hand Respondent imposed highly formal restrictions to suit its own purpose of keeping information from the Committee. In fact, the hearing officer Willick finally terminated the proceeding at the behest of Respondent because Petitioner's arguments had merit and he argued them with passion. Petitioner was thereby prevented from addressing the merits of the dispute, even by written submission. Having denied Petitioner his right to be heard by counsel, Respondent then contended that the way

Petitioner argued his case justified terminating the hearing and his medical staff privileges.

At least one independent member of the Medical Hearing Committee was as shocked by the hearing procedure as Petitioner was. *See Mileikowsky*, 128 Cal. App. 4th at 550 (App. 22a) ("[the hearing officer's] request to deny [Dr. Mileikowsky] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the . . . procedure . . . is an outrageous thing to do."). One other court looked at facts arising from this case and found fatally deficient procedures. On December 22, 2004, California Superior Court Judge Raymond M. Cadei granted an extraordinary Writ of Mandamus in favor of Petitioner against the Medical Board of California to prevent it from acting on a complaint that Respondent had filed against Petitioner (Tenet's "805 Report"). Though he was addressing a collateral matter, also featuring dated allegations, Judge Cadei made the general observation that:

> In this case, the Court finds that, as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination, **no showing of good cause was made, or, in fact, could be made under the procedure followed in this case**.

Amended Minute Order, Dec. 10, 2004, at 2 (emphasis added) (App. 86a).

The ultimate termination of the proceeding deprived Petitioner of any opportunity to clear his name in the NPDB, which to this day contains the Hospital's entry of a summary suspension of his privileges. Petitioner has been unable to obtain privileges at any other hospital because this NPDB entry of a "summary suspension" connotes that he somehow poses a threat of imminent harm to patients.

Petitioner asserted his claims in a timely manner below, initially at the terminating hearing itself (App. 68a). In his

First Amended Petition for Writ of Administrative Mandamus before Superior Court, his first claim was to "allow Petitioner to be represented at the hearing by an attorney." (*id.* 82a). After the Superior Court denied the claim, the Court of Appeal restated Petitioner's argument that "[t]he Hospital upheld the summary suspension [of Petitioner] 'in violation of . . . the due process clauses of the federal and state [C]onstitutions.'" *Mileikowsky*, 128 Cal. App. 4th at 552 (App. 25a) (quotation Petitioner). *Id.* The Court of Appeal considered "whether . . . Dr. Mileikowsky's due process rights were violated by premature adjournment of the hearing." *Id.* at 566 (App. 45a). The court held against Petitioner despite his complaining about lack of counsel and termination on appeal. *Id.* at 562-67 (App. 39a-45a); Appellant's Opening Brief at 7, 34-40. The court assumed that California could maintain its "opt out" status with respect to the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. §§ 11101-52. *Id.* at 557 (App. 31a-32a).

Petitioner sought review by the California Supreme Court, and was supported by six separate filings by *amici curiae*.[2] But the California Supreme Court denied his petition for review on August 17, 2005, from which Petitioner files this timely appeal (App. 1a).

REASONS FOR GRANTING THE PETITION

The courts below applied California law in an unconstitutional manner by allowing (i) deprivation of the right to be heard by counsel by a physician facing retaliation and then (ii) premature termination of the hearing based on his emotional self-representation without the required written recommendation on the merits. Unless reversed, this precedent has dire consequences for our Nation's healthcare system as it chills and deters speech by physicians exposing mistreatment

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[2] These filings by *amici curiae* are available at: http://www.aapsonline.org/mileikowsky .

of patients. Adherence to due process in disciplinary proceedings against outspoken physicians is essential to safeguard and improve quality of care and patient safety. A grant of this Petition is necessary to clarify that property interests established by state law, and in particular medical staff privileges, cannot be deprived by a procedure that violates due process protections.

California law governing physician peer review disciplinary proceedings conflicts with federal law and virtually every other state by authorizing denial of a physician's right to be heard by counsel. *Contrast* Cal. Bus. & Prof. Code § 809.3(c) ("The peer review body shall adopt written provisions governing whether a licentiate shall have the option of being represented by an attorney at the licentiate's expense.") *with* 42 U.S.C. § 11112(b)(3)(C) ("in the hearing the physician involved has *the right*—(i) *to representation by an attorney or other person of the physician's choice*") (emphasis added). California justifies this conflict by having elected to opt out of due process requirements of the Health Care Quality Immunity Act of 1986 (HCQIA), 42 U.S.C. §§ 11101-52.

Another state, Maryland, has concluded that federal law no longer permits states to have "opt out" status. Like California, Maryland opted out; unlike California, Maryland courts have held that federal law preempts its state procedures. "In 1989, however, Congress deleted the opt-out provision from the statute. Thus, Md. Code, Health Occ. art., § 14-502 is no longer effective. The Federal Act applies in Maryland and necessarily supersedes inconsistent State law." *Goodwich v. Sinai Hosp.*, 103 Md. App. 341, 354, 653 A.2d 541, 547 (1995), *aff'd*, 343 Md. 185, 680 A.2d 1067 (1996).

A grant of this Petition is essential to resolve conflicting interpretations of HCQIA by California and Maryland courts, and to protect Californians from deprivation of their constitutional due process rights. Even if California can maintain its "opt out" status under HCQIA, California cannot opt out of

the Fourteenth Amendment. This Amendment guarantees due process for property interests established by, and deprived pursuant to, state law. Privileges at hospitals are established property interests under California law that allows their deprivation without comporting with due process. The decisions below violated the Fourteenth Amendment by sanctioning the deprivation of a property interest without due process.

Retaliation by hospitals against physicians who speak out for patient care has become an epidemic. Hospitals silence physicians who dare to criticize them by abusing procedures for summary suspension. The chilling effect on other physicians is profound. Petitioner Gil Mileikowsky spoke out against the improper destruction of the embryos of two couples and also agreed to testify against Respondent in a battery and malpractice proceeding. He was then summarily suspended despite no indication of any threat to patients' well-being. At a post-suspension hearing, Petitioner was denied his right to be heard by counsel. Out of necessity, he then attempted to represent himself, an exercise that most lawyers would advise against for obvious reasons. Respondent then terminated the hearing based on Petitioner's attempt at self-representation, and thereby cut off his due process rights entirely.

It is necessary for this Court to resolve the dispute over whether a State, such as California, may continue to be opted out of HCQIA, even though Congress has removed the opt-out provision. It is further necessary to clarify that when a State recognizes a property interest, the State cannot authorize deprivation of that property interest through denial of the right to be heard by counsel and termination of the hearing itself based on self-representation. The decisions below further violated due process by denying Petitioner a *de novo* trial in court.

Federal law mandates that disciplinary actions against physicians be reported to the National Practitioner Data Bank, with the result that one revocation of privileges can and often does destroy a physician's career. Yet no physician will dare expose misconduct by hospital administrators if they can simply convene a hearing, deprive the physician of his right to be heard by counsel, and then terminate the hearing based on the physician's emotional defense of himself. There is a strong national interest in correcting the errors made below in depriving a physician of due process and allowing retaliation to destroy his career. *See* Lucian L. Leape, M.D., et al., "Five Years After *To Err is Human*," 293 *Journal of the American Medical Ass'n* 2384, 2389 (May 18, 2005) (observing that patient safety at hospitals will not improve without "pressure that must come from outside the health industry"); Elizabeth Weise, "Medical errors still claiming many lives," *USA Today* 1A (May 18, 2005) ("As many as 98,000 Americans still die each year because of medical errors . . . .").

I. DUE PROCESS WAS VIOLATED BY DENYING THE RIGHT TO BE HEARD BY COUNSEL AT A HOSPITAL PRIVILEGES HEARING, AND THEN TERMINATING THE HEARING BASED ON SELF-REPRESENTATION.

Established as a property interest by California law, *see infra* Point I.A, hospital privileges can only be deprived in compliance with procedural safeguards of the Fourteenth Amendment. Yet the decisions below held otherwise. The lower courts deprived Petitioner of the right to be heard by counsel at a disciplinary hearing and then terminated the hearing based on his self-representation. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Where, as here, the property interest is established, the Fourteenth Amendment

precludes deprivation of that interest without due process, which includes the right to be heard by counsel.

California courts have increasingly ignored the requirements of the Fourteenth Amendment with respect to hearings deciding medical staff privileges. Authorizing hospital administrations to suspend or revoke medical staff privileges in hearings in which the physician is denied counsel has a chilling effect on physicians who, like Petitioner, expose harm to patients caused by hospitals. The quality of patient care ultimately suffers from this distortion of due process. The conflict between California and federal law, and between California courts and the decisions of this and other courts, should be resolved by granting this Petition.

A. California Law Was Applied in Violation of Due Process by Depriving Property in a Hearing that Denied the Right to be Heard by Counsel and then Terminated Based on Self-Representation.

Petitioner Mileikowsky had a property interest in his hospital privileges at Respondent that is well-established under state law. "'Although the term 'hospital privileges' connotes personal activity and personal rights may be incidentally involved in the exercise of these privileges, the essential nature of a qualified physician's right to use the facilities of a hospital **is a property interest** which directly relates to the pursuit of his livelihood.'" *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802, 823 (1977) (quoting *Edwards v. Fresno Community Hosp.*, 38 Cal.App.3d 702, 705 (5th App. Dist. 1974), emphasis added). *See also Sahlolbei v. Providence Healthcare, Inc.*, 112 Cal. App. 4th 1137 (2003); *Chrysler Corp. v. New Motor Vehicle Bd.*, 89 Cal. App. 3d 1034, 1040 (3rd App. Dist. 1979) ("There is also no doubt that this right is one of constitutional dimension. California Constitution, Article I, § 7(a) (1974)."). Once established under California law, this property interest of Mileikowsky

should then have been protected by the procedural safeguards of the Fourteenth Amendment. It was not.

The principle that the Due Process Clause guards against deprivations of property interests, even when state procedures are less protective, has been clear at least since this Court's ruling in *Cleveland Bd. of Ed. v. Loudermill*:

> If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. **The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty.**

470 U.S. 532, 541 (1985) (emphasis added). "The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, **it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.**'" *Id.* (quoting *Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in result in part), emphasis added).

Yet California Business and Professional Code Section 809.3(c) authorizes deprivation of a property interest in violation of the Due Process Clause by allowing a Hospital to deny a physician his right to legal representation at the hearing, and then terminate the hearing based on self-representation. The due process violation here is based on both actions: initially denying counsel and then terminating the proceeding. This Court has suggested that denial of counsel alone may be a violation of due process. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("Counsel can help delineate the issues,

present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."); *Barthold v. U. S. Immigration & Naturalization Serv.*, 517 F.2d 689, 690 (5th Cir. 1975) ("The alien has a statutory right to be represented by counsel at deportation proceedings . . . ."). But even if denial of counsel were permissible, subsequent termination of the proceeding based on self-representation is incompatible with due process.

The court below embraced unconstitutional procedures to affirm what the Hospital did. *See Mileikowsky*, 128 Cal. App. 4th at 541 (App. 9a) (upholding the Hospital position that "[n]either party would be represented by legal counsel," even though the Hospital had its former attorney presiding over the hearing); *see id.* at 557 (App. 31a-34a) (applying Cal. Bus. & Prof. Code § 809 *et seq.*). Petitioner was denied counsel and as soon as he passionately argued on his own behalf, Respondent terminated the sessions and ultimately the hearing itself.

This procedure violates the Due Process Clause. Respondent's own former attorney, Daniel Willick, presided over Mileikowksy's hearing and acted on the advice of Respondent's other counsel Christensen & Auer in terminating the proceeding. Petitioner, meanwhile, was prevented from having his own counsel present. Willick based his termination on California law and alleged disruptiveness by Petitioner in his self-representation: "[t]he intentional acts of misconduct by Dr. Mileikowsky have so prejudiced the hearing that it is impossible to complete it consistent with the requirements of fair procedure and due process imposed by California law." *Mileikowsky*, 128 Cal. App. 4th at 550 (App. 22a) (quotations omitted).

Willick's abrupt termination of the hearing based on alleged disruptiveness is a common strategy among hospitals to retaliate against physicians disfavored for economic or personal reasons. *See* Lawrence R. Huntoon, M.D., Ph.D., "Abuse of the 'Disruptive Physician' Clause," 9 *Journal of*

American Physicians and Surgeons 68 (Fall 2004) ("The term 'disruptive physician' is purposely general, vague, subjective, and undefined so that hospital administrators can interpret it to mean whatever they wish."). There is no evidence of actual disruption in the hearing transcript here beyond disputes and conflicts that occur in every courthouse every day. Yet judges do not terminate proceedings based on conflict. Even if Mileikowsky were actually disruptive, the solution would be to excuse him in favor of written submissions or legal representation. Respondent would allow neither.

Adherence to due process would prevent mere personality conflicts or retaliation from serving as the basis for revoking hospital privileges. Four decades ago the California Supreme Court recognized this, as have other States. *See Rosner v. Eden Township Hosp. Dist.*, 58 Cal.2d 592, 598-99 (1962) (overturning an exclusion of a physician from a medical staff by holding that "[i]n these circumstances there is a danger that the requirement of temperamental suitability will be applied as a subterfuge where consideration having no relevance to fitness are present"). In *Rosner*, as here, the physician was targeted by the hospital because of his testimony against it in a malpractice action. *Id.* at 599 (Dr. Rosner "has apparently testified for plaintiffs in malpractice cases"). The California Supreme Court noted that "a hospital . . . should not be permitted to adopt standards for the exclusion of doctors from the use of its hospital which are so vague and ambiguous as to provide a substantial danger of arbitrary discrimination in their application." *Id.* at 598. *See also Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 25 P.3d 215 (2001) (holding against a hospital after finding the hospital's claim that the physician had been "disruptive" to be merely pretextual). But more recently and with increasing frequency California courts simply contravene due process in denying relief for outspoken physicians.

State action exists because California recognizes a property right in medical staff privileges and the Hospital acted under authority of state law, as enforced by the court below, to deprive Petitioner of that right. *See Mileikowsky*, 128 Cal. App. 4th at 557 (App. 31a-34a) (applying state law); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). In addition, federal law mandates reporting of the summary suspension to the NPDB, for nationwide distribution to all hospitals pursuant to federal law. *See* 42 U.S.C. § 11133(a), 11134(b), 45 C.F.R. §§ 60.1, .2, .7-.9. This federally required reporting, along with the state regulatory scheme governing the hospital proceeding, is sufficient nexus for state action. *See Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (finding state action because "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"); *State ex rel. Ohio AFL-CIO v. Ohio Bureau of Workers' Comp.*, 97 Ohio St. 3d 504, 507 (2002) (finding state action "when the state provides significant encouragement for the activity") (citing *Brentwood Acad.*, 531 U.S. at 296).

The California statute depriving a physician of his right to be heard by counsel, Cal. Bus. & Prof. Code § 809.3(c), as applied here, violates the Due Process Clause.

B. The Decisions Below Further Violated Due Process by Depriving Petitioner of a *De Novo* Hearing in Court on His Constitutional Claim.

The courts below further violated due process by depriving Petitioner of a *de novo* hearing on his constitutional claim. Instead, the lower courts simply found the proceeding to have complied with the inadequate California statute, applying an abuse of discretion standard, and then declined to address the merits of Petitioner's case. *See Mileikowsky*, 128 Cal. App.

4th at 557 (App. 31a). This approach fails to comport with applicable federal precedents.

In the analogous context of denial of counsel in deportation proceedings, the Eighth Circuit has held that "we review *de novo* the district court's denial of the motion to dismiss *because it addresses a mixed question of law and fact, involving the determination of whether the facts established a constitutional violation.*" *United States v. Torres-Sanchez*, 68 F.3d 227, 229 (8th Cir. 1995) (emphasis added). Unlike 8 U.S.C. § 1252(b)(2), as discussed in the *Torres-Sanchez* case that addresses an alien's right to counsel, and unlike the Health Care Quality Improvement Act, 42 U.S.C. 11112(b)(3)(C)(i), which states that "in the hearing the physician involved has the right (i) to representation by an attorney or other person of the physician's choice," the California statute makes no provision for the physician to be represented by counsel in a hearing depriving him of his livelihood. Cal. Bus. & Prof. Code § 809.3(c). The Eighth Circuit in *Torres-Sanchez* found compliance with due process in the absence of counsel only because defendant waived his right to counsel, and only after *de novo* review, unlike here. 68 F.3d at 232.

The Ninth Circuit has also held that a hearing is fundamentally unfair and in violation of the due process if the injured party can show both a fundamental procedural error and that the error caused prejudice. *United States v. Proa-Tovar*, 975 F.2d 592, 595 (9th Cir. 1992) (en banc). Denial of counsel in such an important hearing is a fundamental procedural error. Most lawyers would not even attempt to represent themselves with so much at stake. At a minimum, one's judgment is hindered by the lack of detachment and objectivity. In addition, it is just too difficult to work without an attorney who can be responsible for discovery, questioning witnesses, responding to the hearing officer, and all of the other duties counsel would typically be responsible for in these types of proceedings. The prejudice from denial of counsel is equally clear as

it resulted in the termination of the proceeding, to the detriment of Petitioner. It was an error of due process for the California courts to refuse to address this issue *de novo*. *See Mileikowsky*, 128 Cal. App. 4th at 556-57 (App. 31a). "When, as here, the application of law to fact requires us to make value judgments about the law and its policy underpinnings, and when, as here, the application of law to fact is of clear precedential importance, the policy reasons for de novo review are satisfied and we should not hesitate to review the district judge's determination independently." *United States v. McConney*, 728 F.2d 1195, 1205 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984).

There is no statutory basis for the premature termination of the hearing below, and the Court of Appeal created an inherent power to terminate based on treating the hearing like a judicial proceeding. *See Mileikowsky*, 128 Cal. App. 4th at 562-66 (App. 31a-45a). Imbuing the proceedings with judicial powers implicates state action and its attendant due process protections. "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns . . . ." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). It violated the Due Process Clause to deny Petitioner his day in court in this manner.

C. Adherence to Due Process with Respect to Hospital Privileges Hearings is Essential to the National Interest in Patient Safety.

The number one cause of deaths in America is not tragic fires, handguns, car accidents, or other familiar calamities. Instead, the top killer is reportedly hospital errors, incompetence, wrongdoing and cover-ups. The Christian Science Monitor reported that "about 1 of every 200 patients admitted to a hospital died because of a treatment mistake . . . [which] was more . . . than died in 1998 from highway accidents (43,458), breast cancer (42,297), or AIDS (16,516)." It then

added that some experts think this number of deaths due to hospital misconduct "was almost certainly far too low." Gregory M. Lamb, "Fatal Errors Push Hospitals to Make Big Changes," *Christian Science Monitor* 14 (July 8, 2004). The only way to reduce these errors is to ensure that there is due process protection for physicians like Mileikowsky who speak out against mistreatment of patients.

A study by Health Grades, Inc., estimates that medical errors in American hospitals "contributed to almost 600,000 patient deaths over the past three years, double the number of deaths from a study published in 2000 by the Institute of Medicine." Paul Davies, "Fatal Medical Errors Said To Be More Widespread," *Wall Street J.* D5 (July 27, 2004). Harvard Professor Lucian Leape has written that "[i]n most industries, defects cost money and generate warranty claims. In health care, perversely . . . physicians and hospitals can bill for the additional services that are needed when patients are injured by their mistakes." *Leape, supra*, at 2388. But when physicians like Mileikowsky complain about poor care, they face discipline by the hospital and revocation of their privileges. Enforcement of the Fourteenth Amendment protections against due process violations is essential to end this abuse, and allow informed efforts to improve safety at hospitals.

Unchecked, retaliation against physicians is a growing problem. In one study, nearly 25% of physicians who reported concerns with patient care suffered threats to their jobs. Scott Plantz, M.D., *et al.*, "A National Survey of Board-Certified Emergency Physicians: Quality of Care and Practice Structure Issues," 16 *Am. J. of Emerg. Med.* 1, 2-3 (Jan. 1998). Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series beginning Oct. 26, 2003, entitled "Cost of Courage."[3] His articles showed how

[3] http://www.post-gazette.com/pg/03299/234499.stm

retaliation occurs nationwide, describing in detail the experiences of 25 physicians and a nurse, who suffered from actions adverse to their careers after they tried to improve care at their respective institutions.

Dr. Harry Horner is a physician who had to fight all the way to the Supreme Court of his State of Virginia to obtain reinstatement after retaliation for complaining about poor care at the hospital. *See Horner v. Dep't of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187 (2004). Though difficult to glean from the reported decision, Dr. Horner was exposing the poor care of patients when an administrator at Western State Hospital charged him with violating another employee's right to confidentiality. The administration of Dr. Horner's hospital added charges that he was guilty of abuse and neglect because he failed to wear gloves while dressing a wound on a patient's foot. *See* Bob Stuart, "Court Rules for Whistleblower," *News Virginian* (June 16, 2004). Such pretextual allegations have become common, but California law denies physicians due process in defending themselves.

The impact of the California law, as applied, is severe. While California hospitals benefit economically from hushing up problems and covering up negligence, the public pays an enormous price indeed. Lives are lost. Establishing quality control of the delivery of medical care is essential to public safety. It is in the Nation's interest to correct and curb these abuses of process. *See* Jeff Chu, "Doctors Who Hurt Doctors," *Time* 52 (Aug. 15, 2005) ("Th[e] system is too open to manipulation and needs reform, says the 4,000-member American Association [sic] of Physicians and Surgeons.").

II. REMAND IS NECESSARY FOR RECONSIDERATION IN LIGHT OF THE INTERVENING DECISION OF *WILKINSON V. AUSTIN*, 125 S. CT. 2384 (2005), WHICH EMPHASIZED THE DUE PROCESS RIGHT "TO BE HEARD."

This Court amplified the "procedural safeguard" requirements of due process in its recent decision *Wilkinson v. Austin*, 125 S. Ct. 2384 (2005). Confronted with the analogous context of protecting a liberty interest, this Court emphasized that:

> Our procedural due process cases have consistently observed that [meaningful notice and a fair opportunity for rebuttal] are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations. See *Greenholtz* v. *Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 15, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979); *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U.S. 532, 543, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); *Fuentes* v. *Shevin*, 407 U.S. 67, 80, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"

125 S. Ct. at 2396 (quoting *Baldwin* v. *Hale*, 68 U.S. 223 (1864)). Due process requires that Petitioner be heard, if not orally then through written submissions. Denying him counsel, and then terminating the hearing as he struggled to make his own arguments, contravenes this basic principle of due process. The *Wilkinson* decision, rendered subsequent to the decisions below, requires vacatur and a remand.

In *Wilkinson*, this Court highlighted the essential right of rebuttal to "safeguard against . . . being mistaken for another or singled out for insufficient reason." *Id.* Though that was

in the context of a liberty interest in a prison, the same test would necessarily apply to a hearing that ends a professional's career. In many ways a career-ending event is far more damaging than a temporary confinement in prison; certainly the financial impact is far greater, as is the long-term effect. This Court emphasized the due process requirement of both "the opportunity to be heard . . . and to submit objections prior to the final level of review. This second opportunity further reduces the possibility of an erroneous deprivation." *Id.*

The decision below denied Mileikowsky's "opportunity to be heard" and "to submit objections prior to the final level of review." The holding thereby contravened the principle clarified and amplified in *Wilkinson*, and a remand is necessary in light of this Court's intervening ruling.

III. CALIFORNIA CANNOT CONTINUE TO MAINTAIN "OPT OUT" STATUS UNDER HCQIA AFTER CONGRESS REMOVED THE OPT-OUT PROVISION.

California was one of three states to opt out of Part A of HCQIA before the deadline of October 14, 1989, and the court below relied on California's "opt out" status to apply California rather than federal hearing procedures. *See Mileikowsky*, 128 Cal. App. 4th at 557 (App. 31a-32a). "Apparently, the concern in these states [California, Maryland and Oklahoma] was that the Act affords insufficient protection for peer review activities, so these states chose to offer greater immunity protection." Susan L. Horner, "The Health Care Quality Improvement Act of 1986: Its History, Provisions, Applications and Implications," 16 *Am. J. L. & Med.* 455, 469 (1990). In other words, only these states sought to give hospitals more power through greater immunity, at the expense of the accused, in disciplinary proceedings. In contrast, eleven states affirmatively opted into the HCQIA framework. *See id.* at 469 n. 84 (Colorado, Hawaii, Indiana, Kentucky,

Louisiana, New Mexico, North Carolina, Oregon, Texas, West Virginia, Wyoming).

But by an amendment to the Omnibus Budget Reconciliation Act of 1989, Congress deleted the provision allowing "opt out." Specifically, it deleted the subparagraph (B) that read: "State opt-out. Subsection (a) shall not apply to State laws in a State for actions commenced on or after October 14, 1989, if the State by legislation elects such treatment." 101 P.L. 239, 103 Stat. 2106 (Dec. 19, 1989). By removing and preempting the power of states to opt out, this confirmed that Congress viewed the HCQIA procedures, including the right to be heard by counsel, as essential to due process.

Yet California courts have not cited HCQIA in any published decision since 1988, and insist that California, rather than federal, law applies to these proceedings. "[A] review of the act satisfies us that it was not the intent of Congress to modify existing California peer review hearing procedures." *Gill v. Mercy Hosp.*, 199 Cal. App. 3d 889, 904 (5th App. Dist. 1988). There, as here, the California court rejected the right of a physician to have counsel present in a peer review committee hearing, contrary to the procedures outlined in HCQIA. Ever since California courts have scrupulously avoided any reference to HCQIA, even though its procedural protections should apply as they now do in Maryland, another State that opted out. *See Goodwich v. Sinai Hosp.*, 103 Md. App. 341, 354, 653 A.2d 541, 547 (1995), *aff'd*, 343 Md. 185, 680 A.2d 1067 (1996) ("In 1989, however, Congress deleted the opt-out provision from the statute. Thus, Md. Code, Health Occ. art., § 14-502 is no longer effective. **The Federal Act applies in Maryland and necessarily supersedes inconsistent State law.**") (emphasis added).

Other state courts frequently and properly cite HCQIA in resolving disputes over peer reviews of physicians. *See, e.g., Clark v. Columbia/HCA Info. Servs.*, 117 Nev. at 478-79

(denying immunity because "the reason for his dismissal was his apparently good faith reporting of perceived improper hospital conduct to the appropriate outside agencies"); *Harris v. Bradley Mem. Hosp. & Health Ctr.*, 2005 Conn. Super. LEXIS 1401 (May 19, 2005) (applying HCQIA to deny the hospital's motion for summary judgment on a surgeon's claim for injunctive relief and damages resulting from summary suspension of his privileges); *Lipson v. Anesthesia Servs., P.A.*, 790 A.2d 1261 (Del. Sup. Ct. 2001) (applying HCQIA to deny immunity to a medical practice for claims brought by a terminated physician). California's attempt to bypass and ignore HCQIA in reviewing these issues is contrary to federal law, conflicts with other states and violates the Due Process Clause. This Petition should be granted to establish that California peer review procedures must comply with the Fourteenth Amendment and are subject to application of HCQIA.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

Dated: November 14, 2005

APPENDICES

APPENDIX A

SUPREME COURT OF CALIFORNIA

[Filed August 17, 2005]

S134269

GIL N. MILEIKOWSKY,
Plaintiff and Appellant,

v.

TENET HEALTHSYSTEM *et al.*,
Defendants and Respondents.

OPINION

Petition for review denied.

Request for judicial notice granted.

Kennard, J., is of the opinion the petition should be granted.

Werdegar, J., was absent and did not participate.

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 4

[Filed May 4, 2005]

B 168705
Los Angeles County No. BS07913 1

GIL N. MILEIKOWSKY, M.D.

v.

TENET HEALTHSYSTEM, *et al.*

THE COURT: Petition for rehearing is denied.

Roger Jon Diamond
2115 Main Street
Santa Monica, CA 90405-2215

cc: All Counsel
File

APPENDIX C

COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FOUR

[Filed April 18, 2005]

B168705

GIL N. MILEIKOWSKY,
Plaintiff and Appellant,

v.

TENET HEALTHSYSTEM *et al.*,
Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County, David P. Yaffe, Judge. Affirmed.

CURRY, J.—Appellant Gil N. Mileikowsky, M.D., held staff privileges with respondent Encino-Tarzana Regional Medical Center (the Hospital) until it terminated those privileges.[1] More precisely, the Hospital determined not to reappoint Dr. Mileikowsky to staff in January 2000, a decision that permitted Dr. Mileikowsky to continue working there while a hearing on the denial took place. Then, in November 2000, the Hospital summarily suspended his staff privileges which immediately cut off his use of its facilities.

California law (Bus. & Prof. Code, § 805 et seq.) codifies a physician's right to seek peer review of adverse decisions concerning staff membership. In an effort to implement the statutory provisions, the Hospital promulgated Medical Staff Bylaws (Bylaws) which contain, among other thing, a description of its hearing and appellate review procedures, re-

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[1] Respondent Tenet Healthsystem is, as we understand it, the Hospital's parent company. The two are jointly referred to herein as respondents.

ferred to as a "Fair Hearing Plan." In accordance with the Bylaws, a hearing was convened before a panel of peers (the Hearing Committee[2] to review the Hospital's dual actions. The hearing went on for many sessions, but did not culminate in a finding on the substantive charges. Instead, the hearing officer terminated the proceedings based on Dr. Mileikowsky's having committed a number of alleged procedural transgressions, including violation of orders and disruption of hearing sessions. His decision was upheld after an administrative appeal.

Dr. Mileikowsky filed a petition for writ of mandate contending that the hearing officer did not have the authority to suspend the hearing. He sought a new or further hearing. The trial court denied the writ. He appeals from the denial, supported by amicus curie briefs from the Association of American Physicians & Surgeons, Inc. (Association), Union of American Physicians and Dentists (Union), and Consumer Attorneys of California (Consumer Attorneys). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Denial of Dr. Mileikowsky's Reappointment Application

Certain background facts are not in dispute. Dr. Mileikowsky's staff privileges at the Hospital commenced in 1986. In 1998, privileges were revoked on the ground that he had not timely submitted an application for reappointment, and had therefore voluntarily resigned. Dr. Mileikowsky, insisting that his failure to reapply was inadvertent, filed a petition for writ of mandate in a related lawsuit (*Mileikowsky v. Tenet*, Super. Ct. L.A. County, 1999, No. BS056525) seeking to set aside the determination that he had resigned.[3] The trial court grant-

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[2] Dr. Mileikowsky refers to this body as the Medical Hearing Committee or MHC. Respondents prefer the term Judicial Review Committee or JRC. We use the term found in the Bylaws.

[3] Dr. Mileikowsky later filed a second complaint (*Mileikowsky v. Tenet Healthsystem*, Super. Ct. L.A. County, 2000, No. BC233153) which end-

ed a temporary restraining order and request for preliminary injunction in April 1999. Following that, the Hospital reversed course and acted on Dr. Mileikowsky's application for reappointment on January 11, 2000—by recommending that it be denied.[4] The stated grounds were that Dr. Mileikowsky engaged in "dangerous, disruptive, threatening, abusive and unprofessional conduct in relation to [Hospital] personnel, Medical Staff officers, and patients."[5]

Dr. Mileikowsky challenged the decision, seeking a hearing as provided in the Bylaws. Under the Bylaws, practitioners impacted by an "adverse recommendation or action,"

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ed up essentially superseding the first complaint. That litigation culminated in the related appeal in *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262 [26 Cal. Rptr. 3d 831], from an order imposing sanctions on Dr. Mileikowsky, including both monetary sanctions and an order striking the complaint, for repeated refusals to provide discovery.

[4] To be precise, the action was undertaken by the Hospital's Medical Executive Committee (MEC), but since the actions of the MEC are, for all relevant purposes herein, the actions of the Hospital, we do not distinguish between the two.

[5] Details were provided in a June 2000 letter setting Hearing Committee review of the decision, which set forth 43 specific charges against Dr. Mileikowsky, including that he "disrupted a planned childbirth class" in 1989 by "refusing to vacate the doctors[']] dining area"; copied records in violation of established policy in 1989, 1991, and 1993; ordered a nurse to modify a medication order written by another physician in 1990; failed to visit a patient for two days in 1990; negligently lacerated a patient's cervix in 1991; negligently perforated a patient's colon in 1991; sutured an episiotomy without anesthesia in 1995; and failed to complete documentation of medical records. A number of the charges had to do with lack of cooperation with attempts by the Hospital's peer committees to review his cases, including threatening to refuse to meet with one committee in 1989; failing to attend a meeting in 1990; interfering with another committee's review of the perforation incident; bringing court reporters to committee meetings; claiming that members were acting out of improper motives; failing to attend meetings in 1996; failing to respond in writing to allegations of misbehavior; leaving a 1998 meeting after only a few minutes; and refusing to accept certified letters containing notice of meetings.

including "denial of reappointment" or "suspension of staff membership," are permitted to request a hearing before a "hearing committee" and to appeal any adverse decisions to an "appellate review body." (Bylaws, art. VIII, § 2.A.2, 2.A.3, 2.C, and 2.D.)

A hearing commenced, but in September 2000, the Hospital's advocate filed a motion contending that Dr. Mileikowsky had waived his hearing rights by failing to produce documents regarding termination of his medical staff privileges at Cedars-Sinai in 1998. The hearing officer submitted the issue to the Hearing Committee which ruled that Dr. Mileikowsky had waived his right to a hearing. This was appealed to the appellate review body appointed pursuant to article VIII, section 6.D of the Bylaws.[6]

The appellate review body agreed that Dr. Mileikowsky violated article VIII, section 3.G of the Bylaws by deliberately delaying and refraining from producing evidence.[7] The appellate review body further agreed with the Hospital that article VIII, section 10.C of the Bylaws "provides the basis for waiver of rights under the Bylaws in a broad range of circumstances."[8] The appellate review body did not, how-

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[6] Article VIII, section 6.D permits the chair of the Hospital's governing board to appoint an appellate review committee to review decisions of a hearing committee. In his brief, Dr. Mileikowsky refers to this body as the "Appeal Body." Respondents simply call it "the Board." Again, we prefer the term used in the Bylaws.

[7] Article VIII, section 3.G gives both sides the right to inspect and copy documentary information relevant to the charges against the physician. It further provides that disputes regarding requests for access to documents shall be submitted to the hearing officer "who may impose any safeguards deemed necessary in the interests and [*sic* (probably should be 'of')] fairness or for the protection of the peer review process."

[8] Article VIII, section 10.C provides: "If at any time after receipt of notice of an adverse recommendation, action or result, a practitioner fails to make a required request or appearance or otherwise fails to comply with this Fair Hearing Plan or to proceed with the matter, s/he shall be

ever, uphold the ruling that the proceedings initiated by Dr. Mileikowsky should be terminated. It concluded instead that Dr. Mileikowsky should be disallowed from entering into evidence matters regarding his termination of medical staff and clinical privileges at Cedars-Sinai or any other matter related to documents that had not been produced by him on a timely basis. In addition, the Hearing Committee would be entitled to make adverse findings of fact against Dr. Mileikowsky based on his failure to produce documents.

B. Summary Suspension

The appellate review body's decision reinstating proceedings on the decision to deny the reappointment application was issued on April 26, 2001. In the meantime, as we have seen, Dr. Mileikowsky's medical staff privileges at the Hospital were summarily suspended on November 16, 2000. The Hospital's letter of that date to Dr. Mileikowsky confirming the "oral notice [of his suspension] previously provided" stated that the suspension was based on the conclusion of the president of the medical staff and the chief executive officer that "failure to immediately suspend [Dr. Mileikowsky's] clinical privileges may result in an imminent danger to the health, safety, or well being of patients and/or others."

Dr. Mileikowsky requested "as soon as possible . . . an explanation of the factual bases of [the Hospital's] conclusion that '. . . failure to immediately suspend [Dr. Mileikowsky's] clinical privileges may result in an imminent danger to the health, safety, or well being of patients and/or others.'"

A report dated November 28, 2000, described six incidents to support the summary suspension. The first occurred in February 1999, when Dr. Mileikowsky came to complain

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deemed to have consented to such adverse recommendation, action or result and to have voluntarily waived all rights to which he might otherwise have been entitled under the medical staff bylaws then in effect or under this Fair Hearing Plan with respect to the matter involved."

about the notice that his appointment had expired based on failure to submit an application for reappointment, he became "very angry, loud and aggressive" when a staff member refused to allow him to see his credential file. He also "roughly grabbed [another staff member who refused his request] by the lapel badge." It was further alleged that he cursed at the staff members and threatened to get them fired. The second stated basis for the suspension was a December 1999 incident where Dr. Mileikowsky was informed, during performance of a surgery, that his assistant did not have surgical privileges. Dr. Mileikowsky allegedly backed the operating room manager against a wall while screaming at her and jabbing his finger in her face. The third basis for the suspension was an August 2000 incident in which Dr. Mileikowsky took pictures to support his request for a new TRO in the related lawsuit. His actions purportedly caused one female medical staff obstetrician to be "startled, frightened and upset." The fourth incident occurred in October 2000, when Dr. Mileikowsky used a vacuum extractor during a delivery more than three times and applied fundal pressure during a difficult delivery. The fifth incident occurred on November 5, 2000. Dr. Mileikowsky asked odd questions of the attending nurse while performing a circumcision, and allegedly removed excessive skin. The sixth incident occurred on November 10, 2000, when Dr. Mileikowsky brought his "office manager" to view a delivery. The Hospital's security was instructed to prevent this person from observing the delivery, and Dr. Mileikowsky yelled at the security guard "in a very hostile manner."

To bolster the summary suspension, the report noted that the nurses union had, on November 16, 2000, submitted a written complaint to the Hospital's chief executive officer complaining about Dr. Mileikowsky's behavior, and that Dr. Mileikowsky entered Hospital premises and attempted to utilize photocopying equipment after being informed of his suspension.

C. Administrative Hearing

Dr. Mileikowsky requested a formal hearing to review the summary suspension. In response, the Hospital expressed its intent to both set a hearing on the summary suspension and restart the hearing on the denial of the request for reappointment. The hearing was to be held before a single Hearing Committee consisting of five members of the medical staff. Daniel Willick was appointed hearing officer[9] and Dr. Richard Wulfsberg was assigned to be the advocate for the Hospital. Neither party would be represented by legal counsel, in accordance with article VIII, section 4C of the Bylaws.[10]

The general charges were summarized as follows: "A. You have engaged in a long and on-going pattern of dangerous and unacceptable mistreatment of patients, staff and medical staff. [P] B. You have engaged in a pattern of unacceptable, aggressive verbal and physical assaults on hospital personnel. [P] C. You have provided dangerous and substandard care in violation of express hospital rules. [P] D. You have engaged in a long and on going pattern of interference and obstruction of the peer review process, without good cause, regarding issues related to your medical management of patients' [*sic*] and your conduct."

The Hospital listed 37 specific facts to support the general charges, essentially a compilation of the facts set forth earlier to support the Hospital's decisions to deny reappointment and summarily suspend staff privileges, with some of the older in-

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[9] Both sides acceded to his appointment in that capacity.

[10] Article VIII, section 4.C provides that "neither the petitioner, the executive committee nor the governing boar[d] shall be represented, by legal council [*sic*], before the Hearing Committee unless the Board, in its sole discretion, permits all sides to be represented by legal counsel" and that the petitioner "shall be entitled to be accompanied and represented at the hearing by a licensed practitioner who is not an attorney-at-law and who preferably is a member of hospital's medical staff."

cidents omitted. The incidents began in 1990, and, as we have seen, ranged from such matters as possible medical mistakes to failure to attend meetings or cooperate with other physicians attempting to conduct peer review of patient treatment. Charge number 27 specifically alleged that Dr. Mileikowsky had been summarily suspended by Cedars-Sinai in January 1998.

1. Request for Dismissal of Charges/Bifurcation

Dr. Mileikowsky objected to the number of charges and the age of the majority of the incidents described. He sought to have the older charges dismissed by the hearing officer. He also sought to have the hearing bifurcated so that matters pertaining to the summary suspension could be resolved first. At that time, he took the position that "[s]ince the By-laws limit the [Hearing Committee's] role to fact finding, it necessarily follows that [the hearing officer] must rule on issues of law, including motions to exclude evidence."

The hearing officer ruled that he lacked authorization under either the Bylaws or California law to dismiss charges. The hearing officer further ruled that he lacked authority to stay the summary suspension and that "[b]ifurcation of these proceedings would be inappropriate since the [Hospital] contends that all of the charges against Dr. Mileikowsky are the basis for his summary suspension" and "bifurcation would not lead to any quicker decision on the summary suspension since the same evidence will be presented by the [Hospital] as the basis for both the summary suspension and the recommendation to terminate privileges." In the hearing officer's view, although the Hospital "initially based the summary suspension on certain limited charges" it was not precluded from contending at the hearing "that the summary suspension [was] justified by all of the allegations against Dr. Mileikowsky."

Dr. Mileikowsky repeatedly asked the hearing officer to reconsider his decision on bifurcation and issue a swifter deci-

sion on the summary suspension. When these efforts proved fruitless, he requested permission to address these issues directly to the Hearing Committee. On August 28, 2001, the hearing officer expressly ruled: "Dr. Mileikowsky may not present his motion for bifurcation to the [Hearing Committee]. Pursuant to the [Bylaws] [citation], the Hearing Officer determines the order of procedure at the hearing and makes all rulings on matters of procedure. . . . [The motion for bifurcation] which concerns procedure may not be presented to the [Hearing Committee]. [P] . . . While I recognize that Dr. Mileikowsky disagrees with the procedures being followed at this hearing, he does not have the authority to decide what those procedures will be."

2. Hearing Officer's Discovery Rulings

In connection with the hearing, the Hospital requested that 20 categories of documents be produced, including "[a]ll documents identifying any professional medical, psychiatric, psychological, substance abuse or personnel counseling services [he] received" going back to his medical internship and a 1984 fellowship program, and documents reflecting his whereabouts on particular days from January 23, 1991, to July 6, 2000. In response to the parties' motions, the hearing officer ruled that some of the document requests were overbroad or violated Dr. Mileikowsky's right to privacy, but otherwise ordered the requested documents to be produced, acknowledging that certain documents might not exist due to the passage of time.

With regard to charge 27, the Cedars-Sinai charge, the hearing officer requested clarification concerning how the charges related to the Hospital's actions against Dr. Mileikowsky in 2000. By letter dated March 19, 2001, the Hospital supplied additional detail, alleging that Dr. Mileikowsky "failed to provide the Credentials Committee with a suitable explanation for the Cedars-Sinai Medical Center action, thereby interfering with the Credentials Committee's ability to process

[his] reappointment application." The letter narrowed the request to production of the formal written decisions that upheld termination of Dr. Mileikowsky's staff privileges at Cedars-Sinai. On April 12, the hearing officer ordered that those documents be produced.

In May 2001, the Hospital reported that Dr. Mileikowsky had failed to supply the requested Cedars-Sinai documents and asked that there be a finding that "Dr. Mileikowsky's suspension and subsequent termination at [Cedars-Sinai] occurred because Dr. Mileikowsky provided dangerous and substandard care which caused a potential or imminent danger of harm to patients."

In a ruling dated June 11, 2001, the hearing officer ruled that "the [Hospital] will be permitted to disclose to the Hearing Committee Dr. Mileikowsky's violation of my ruling that he produce the [Cedars-Sinai] Judicial Review Committee decision and findings in the matter which led to his suspension and loss of privileges and that he produce the written decision of the Governing Board of [Cedars-Sinai] affirming the decision of the Judicial Review Committee. The Hearing Committee will be permitted to learn that Dr. Mileikowsky's Medical Staff privileges at [Cedars-Sinai] were suspended and terminated due to a medical disciplinary cause or reason in November 1999 as a result of an accusation filed in January, 1998."

Dr. Mileikowsky protested, contending that Cedars-Sinai had not authorized him to release documents and pointing out that he had signed a release permitting Cedars-Sinai to release documents to the Hospital. The hearing officer did not change his ruling.

3. Hearing Officer's Ruling Re Written Submissions on Peer Review

As we have seen, some of the charges against Dr. Mileikowsky involved failure to cooperate in peer review with respect

to his care of certain patients where there was no allegation that the care itself was deficient. In a June 11, 2001, ruling, the hearing officer instructed the parties to submit a brief statement in writing as to each allegation that Dr. Mileikowsky failed to cooperate in peer review involving patient care where there was no charge that Dr. Mileikowsky provided deficient patient care. These written submissions were to be submitted to the Hearing Committee and there was not to be any other presentation of evidence regarding underlying patient care in those cases.

In his August 24, 2001, letter, the hearing officer stated: "Dr. Mileikowsky is in default on my June 11, 2001 Ruling . . . which requires certain written submissions about peer review and patient care . . . ." In an October 12, 2001, ruling, after noting that Dr. Mileikowsky had still not submitted any statements, the hearing officer warned: "In the absence of any appropriate written submission from Dr. Mileikowsky regarding patient care and peer review in compliance with my June 11, 2001 Ruling . . . , I will instruct the Hearing Committee that based upon this they may find that the Medical Staff's initiation of peer review of Dr. Mileikowsky's patient care was reasonable and warranted as to those peer review matters where the only charges against Dr. Mileikowsky are that he failed to participate in, cooperate in, or obstructed peer review. [Fn. omitted.] I will issue this instruction when evidence is first presented on such peer review."

4. Hearing Officer's Rulings Re Lawsuit/Exhibits

The hearing officer issued rulings pertaining to exhibits in the period before the evidentiary portion of the hearing began. On July 11, 2001, he ruled that the parties should not present documents filed in the lawsuits except for sworn statements relevant to the matters at issue in the hearing and that Dr. Mileikowsky was to submit an organized set of his proposed exhibits and an exhibit list 10 days before the next hearing session. In an August 24, 2001, letter, the hearing officer

stated that Dr. Mileikowsky was "in default on my July 11, 2001 Ruling . . . regarding submission of his exhibit list and exhibits by August 6, 2001." In a ruling dated August 28, the hearing officer stated: "Dr. Mileikowsky apparently is choosing to ignore the requirement . . . that all documents expected to be introduced at the hearing must be exchanged at least ten days prior to commencement of the hearing. . . . This default precludes Dr. Mileikowsky from presenting exhibits at the hearing unless and until he presents a request for relief from his default along with an exhibit list and proposed exhibits submitted to the Hearing Officer and the [Hospital]." In a letter dated October 1, the hearing officer reiterated that "Dr. Mileikowsky's continuing failure to seek to cure [defaults with respect to exhibits] is extremely ill advised, and if not corrected quickly will easily have the legal effect of resulting in his concession of the validity of major aspects of the allegations against him."

Dr. Mileikowsky expressed a wish to present as exhibits documents filed in the lawsuit and transcripts of proceedings, primarily to illustrate that the Hospital violated the preliminary injunction granted in case number BS056525. This was the subject of numerous letters to the hearing officer in which he reiterated his request and berated the hearing officer for denying it. In various letters on this subject, Dr. Mileikowsky accused the hearing officer of "suffer[ing] from . . . delusions"; "express[ing] [his] ignorance of the subject"; behaving "irresponsibl[y]"; being "out of touch"; failing to "face reality"; and showing "confusion."

In a ruling dated March 14, 2001, the hearing officer stated: "This hearing will not be a forum for Dr. Mileikowsky to present proof of the claims which he is asserting in his pending lawsuits against various members of the Medical Staff at [the Hospital] . . . . Dr. Mileikowsky should not seek to inform the members of the Hearing Committee of his pending lawsuits." On July 11, the hearing officer issued a further rul-

ing that stated: "As explained in my March 14, 2001 Ruling this hearing will not be a forum for Dr. Mileikowsky to litigate his pending lawsuits and he shall not seek to inform the Hearing Committee of the lawsuits." In a letter dated August 24, the hearing officer stated: "I will not change my rulings excluding the submission of court filings from Dr. Mileikowsky's lawsuits, other than relevant sworn statements, as exhibits in this matter."

In a September 13, 2001, ruling, the hearing officer reiterated that the parties should not bring up the lawsuits at the hearing. That order described an attempt by Dr. Mileikowsky to ask questions that implied there had been a violation of a court order by the Hospital with respect to his encounter with a security guard in November 2000. The hearing officer noted that Dr. Mileikowsky reacted emotionally and yelled in reaction to the hearing officer's ruling. The September 13 ruling stated that a recess would be called whenever Dr. Mileikowsky was "out of control" and that sanctions would be imposed if the behavior recurred.

5. Hearing Officer's Rulings Re Contact with the Hearing Committee

On several occasions during voir dire of potential Hearing Committee members, the hearing officer stated that "[t]he matters that go on within this hearing room are confidential and should stay in the hearing room and not be repeated outside the hearing room. The only things to be said outside the hearing room are, if you're on the hearing committee, the dates of the hearings and where the locations are."

On November 1, 2001, the hearing officer issued a ruling in response to Dr. Mileikowsky's charges that Dr. Wulfsberg and others had improper contacts with the Hearing Committee. Dr. Mileikowsky had stated: "The members of the Hearing Committee are like a jury and it is well known that neither party is supposed to have any ex parte communications

with jury members." The hearing officer's response was, among other things: "No evidence has been presented by Dr. Mileikowsky to show that there has been any violation of my admonitions to the Hearing Committee and to the parties not to have communications with members of the Hearing Committee regarding the substance of these proceedings except in the hearing room" and "it is inevitable that each of the parties to the proceedings . . . and their representatives are in contact with the members of the Hearing Committee. As I have instructed the Hearing Committee, what is important is that there is no communication with members of the Hearing Committee regarding the substance of these proceedings, except in the hearing room."

6. Dr. Mileikowsky's Conduct During Hearing Sessions

The hearing commenced in January 2001. Sessions were generally scheduled in the evening, from 6:30 p.m. until 10:00 p.m. Voir dire of potential panel members and other procedural matters consumed seven sessions—which were spread out over many months—and actual substantive matters were not addressed until August 16, 2001, when opening statements were made. Over the course of the next 16 sessions which took place between August and December 2001, the Hospital called witnesses to testify in support of the charges.

Dr. Mileikowsky arrived late at the session on August 28, 2001, and requested a continuance because his physician-assistant was in surgery. He submitted a written motion to bifurcate and argued with the hearing officer about whether he could present it to the Hearing Committee—issues that had already been addressed by the hearing officer. He tried to bring up the related lawsuit. He argued with the hearing officer about whether the hearing officer had the authority to limit examination of witnesses. He argued with the hearing officer when the hearing officer admonished him to ask questions rather than engage in a dialogue. He argued with the hearing officer when the hearing officer questioned the rele-

vance of a line of questioning. At one point, the hearing officer stated that Dr. Mileikowsky seemed to be trying to "provoke something."

At the August 29, 2001, session, Dr. Mileikowsky argued with the hearing officer when the hearing officer interrupted him for badgering a witness. Dr. Mileikowsky attempted to question a witness about the lawsuit and preliminary injunction and argued with the hearing officer when the hearing officer cut off the line of questioning. He interrupted the questioning of a witness to demand production of a patient chart, and referred to the hearing as "the Spanish Inquisition." Dr. Mileikowsky repeatedly criticized the hearing officer for "interrupting" him and for taking the Hospital's side when the hearing officer ruled against him on objections. Similar comments were made at the August 30 session and the September 4 and 5 sessions. At the September 4 session, the hearing officer threatened to suspend questioning if Dr. Mileikowsky did not cease arguing about a ruling. At the September 5 session, the hearing officer admonished Dr. Mileikowsky for intimating that court orders had been violated and for bringing up the litigation. Also on September 5, the hearing officer reminded Dr. Mileikowsky of the ruling concerning the lawsuits and warned him if he persisted in trying to "perpetrate [the] fiction about there being a court order . . . that prohibited people from escorting [him]," the hearing officer would "take steps to precisely inform the [Hearing Committee] of what the true nature of the law was." At the very next session, on September 29, 2001,[11] however, Dr. Mileikowsky attempted to bring up the litigation again.

At the October 22 session, the Hospital introduced a document that purported to summarize the medical cases that triggered the attempted peer review process in 1998. The

[11] Several hearing sessions scheduled for mid-September were cancelled due to the attack on the World Trade Center on September 11, 2001.

document had been prepared at the request of the hearing officer since the underlying care of the patients involved was not raised in the charges that led to the termination of staff privileges and was not directly at issue in the hearing. Dr. Mileikowsky had been provided an opportunity to create a document addressing why he believed these cases should not have triggered peer review, but had not done so. Dr. Mileikowsky accused the hearing officer of being out of touch with reality. The hearing officer warned Dr. Mileikowsky that he could adjourn the hearing. After a lengthy discussion, the session was terminated early because Dr. Wulfsberg's continuity with the witness had been disrupted.

The October 23, October 29, and November 1, 2001, sessions were interrupted for argument concerning whether Dr. Mileikowsky could introduce exhibits when he was in default of the Bylaws and the hearing officer's order concerning preparation of an exhibit list and providing copies of proposed exhibits to the Hospital.

Dr. Mileikowsky again attempted to bring up the related litigation and preliminary injunction at the November 5, 2001, session. At that point, Dr. Wulfsberg asked for greater sanctions, such as excusing the witness or stopping the hearing.

At the November 12, 2001, session, there were several periods when questioning was interrupted while Dr. Mileikowsky argued with the hearing officer over rulings. At one point the hearing officer warned Dr. Mileikowsky to stop "[o]r [he] will excuse [Dr. Mileikowsky] from the hearing room."

The transcripts reflect that two sessions besides the October 22 sessions were terminated early.[12] The session on No-

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[12] Respondents' brief indicates that "four hearing sessions" were "cut short and/or cancelled" as the result of "Dr. Mileikowsky's disruptive behavior." The brief goes on to cite *three* sessions in addition to the two discussed above—the sessions on September 5, October 29, and December 3, 2001. The session on September 5 commenced at 6:56 p.m. and was

vember 29, 2001, was terminated by the hearing officer after Dr. Mileikowsky made some foundational objections and complained that he had not received copies of documents being shown to the witness and the panel. The session, which began at around 7:00 p.m., was adjourned at 7:25 p.m.—over Dr. Mileikowsky's objection—so that copies of documents could be supplied to him.[13] On November 30, 2001, the hearing officer issued a ruling noting there had been "repeated instances where Dr. Mileikowsky has disrupted the hearing by yelling and refusing to comply with my rulings" and warning he would "take appropriate action" if the disruptions did not cease. The ruling also noted that Dr. Mileikowsky was often late to arrive and had caused sessions to start late. The ruling further stated that the hearing officer was satisfied that documents at issue on November 29 had been faxed to Dr. Mileikowsky.

The session on December 17, 2001, which began at 6:37 p.m., was adjourned early—at 8:12 p.m.—when Dr. Mileikowsky argued with the hearing officer over objections sustained during Dr. Mileikowsky's cross-examination of a witness testifying concerning the vacuum extraction. For example, Dr. Mileikowsky asked the witness to find something objective on the chart that would document any injury to the baby.

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ended at 9:42 p.m. by the hearing officer because he thought the members of the Hearing Committee "need to get some sleep." The October 29 session commenced at 7:10 p.m. and ended at 9:45 p.m., which was, according to the hearing officer "beyond the time I said we'd adjourn." The session on December 3 commenced at 7:06 p.m. and ended at 9:49 p.m. after the hearing officer indicated an intention to "take a break to talk about other [matters]."

[13] The Hospital subsequently submitted proof that Dr. Mileikowsky had timely received a copy of the exhibits—a letter from the Hospital to the hearing officer enclosing a copy of a facsimile transmission sheet dated November 19, 2001, and an Airborne Express document indicating that a package had been signed for by Dr. Mileikowsky's receptionist on November 20, 2001.

The witness referred to "a cephalohematoma." Dr. Mileikowsky interjected that that was not an objective document. The hearing officer told him not to interrupt the witness and to ask a question. A few minutes later the witness said that Dr. Mileikowsky would have to "ask a pediatrician" whether a cephalohematoma could be distinguished from an edema by the speed at which it resolved. Dr. Mileikowsky retorted: "The fact is that you have the hutzpah [*sic*] to sit here and say that I caused injury . . . and you don't have the knowledge." When the hearing officer told him he was out of order and threatened to adjourn the hearing, Dr. Mileikowsky said that the whole hearing was out of order and that the hearing officer was "ready to adjourn before we started." The hearing officer abruptly adjourned the hearing stating that "Dr. Mileikowsky is refusing to abide by my ruling . . . regarding no argument." No further evidentiary sessions were held after that date.

7. Posthearing Rulings

On December 24, 2001, the hearing officer asked the parties to submit briefs regarding his authority to declare a default based on Dr. Mileikowsky's actions in the following areas: failure to produce documents; failure to prepare an exhibit list and set of exhibits; failure to submit a written statement concerning the peer review allegations; and repeated disruption of hearing sessions by violating orders concerning questioning of witnesses and repeated references to the lawsuits he had filed.

On January 3, 2002, the hearing officer issued a written ruling stating that Dr. Mileikowsky had "acted to disrupt the orderly conduct of [the] hearing on a number of occasions" by refusing "to comply with [the hearing officer's] Rulings regarding the examination of witnesses and the introduction of evidence"; engaging in "noisy yelling at hearing sessions" on September 5, November 29, and December 17, 2001; and making statements containing "invective and personal attacks

directed towards witnesses" and others. The hearing officer ruled that further questioning of witnesses on Dr. Mileikowsky's behalf be done by his assistants or representatives, that the hearings be videotaped, and that a security officer be present in the hearing room. He stated that "[t]he hearing sessions shall not reconvene until Dr. Mileikowsky responds in writing that he will comply with my rulings regarding the conduct of this hearing, including specifically the rules set forth in this Ruling."

A few days later, the hearing officer postponed a scheduled session because Dr. Mileikowsky had sent him a letter indicating he would not abide by the ruling concerning the examination of witnesses, and that he would like to have his own videotape technician and security guard in the room.

On February 19, 2002, the hearing officer reiterated in a written ruling that "the 'hearing sessions shall not reconvene until Dr. Mileikowsky responds in writing that he will comply with my rulings regarding the conduct of this hearing, including specifically the rules set forth in' [the] January 3, 2002 Ruling."

On March 1, 2002, the hearing officer asked the parties to submit a written brief on the issue of whether Dr. Mileikowsky had abandoned his defense of the matter by refusing to state that he would comply with the rulings regarding future proceedings or whether other procedures should be followed. Dr. Mileikowsky prepared a brief, sending it not just to the hearing officer and Dr. Wulfsberg, but also to the members of the Hearing Committee. The brief stated that the hearing officer had ruled that questioning of witnesses on Dr. Mileikowsky's behalf had to be conducted by one of his representatives. An attached letter from his two representatives stated that they did not feel qualified to provide the kind of representation that the hearing officer's ruling demanded.

On March 19, 2002, a member of the Hearing Committee reportedly called the Hospital and said "[the hearing officer's] request to deny [Dr. Mileikowsky] from questioning witnesses is outrageous, absolutely outrageous, to change in the middle of the . . . procedure . . . is an outrageous thing to do." Attorneys representing the Hospital sent a letter claiming that "The statements . . . contained in Dr. Mileikowsky's . . . brief are so inflammatory, false and misleading that there is no way this [hearing] can be rehabilitated," and asked the hearing officer to rule that he had "failed to proceed . . . in good faith and has therefore waived his rights to hearing and an appellate review."

8. Hearing Officer's Order Terminating Proceedings

On March 30, 2002, the hearing officer issued a ruling formally terminating the hearing sessions, stating that "[t]he intentional acts of misconduct by Dr. Mileikowsky have so prejudiced the hearing that it is impossible to complete it consistent with the requirements of fair procedure and due process imposed by California law" and that "Dr. Mileikowsky's repeated acts of misconduct at this hearing have created a situation where he has waived his right to the completion of this hearing and thereby has failed to exhaust his administrative remedies."

According to the ruling, the primary basis for the decision to terminate was the letter Dr. Mileikowsky wrote to the members of the Hearing Committee, which the hearing officer deemed "unauthorized" and "an obvious attempt to prejudice their consideration of the matters before them." The hearing officer referred to his November 1, 2001, ruling wherein it was reportedly stated that "the Hearing Committee have no communication 'regarding the substance of these proceedings, except in the hearing room'" and that "'the parties not . . . have communications with members of [the] Hearing Committee regarding the substance of these proceedings, except in the hearing room.'" In addition, the hearing

officer accused Dr. Mileikowsky of misinforming the Hearing Committee in his letter by indicating that no one would be able to question witnesses on Dr. Mileikowsky's behalf. As evidence of prejudice from these actions, the hearing officer stated: "At least one Hearing Committee member is reported to have been outraged by my purported refusal to allow any representative of Dr. Mileikowsky to question witnesses."

The second basis was Dr. Mileikowsky's conduct with respect to his related lawsuit. The hearing officer stated: "Since I wished to have the Hearing Committee use its own judgment without reference to inconclusive legal proceedings, I ruled that the lawsuits should not be referenced in the Medical Staff hearing" in order to "protect Dr. Mileikowsky from prejudice and confusion[.] [H]e violated my rulings by continuously making reference to his lawsuits in front of the Hearing Committee and by misrepresenting the rulings in his lawsuits."

The third basis was Dr. Mileikowsky's violation of orders regarding discovery in June and July 2001. The ruling particularly referenced documents related to the decision of Cedars-Sinai to terminate his medical staff privileges, and calendars and appointment books that would have indicated Dr. Mileikowsky's whereabouts when he avoided appearing at peer review investigations.

The fourth basis was failure to produce copies of exhibits expected to be introduced at the hearing 10 days before the commencement of the hearing in July 2001.

The fifth basis was Dr. Mileikowsky's failure to submit any briefing concerning the allegations that he failed to cooperate in peer review.

The sixth basis was Dr. Mileikowsky's conduct in disrupting hearing sessions by allegedly "yelling, . . . disobeying [the hearing officer's] rulings regarding the questioning of witnesses, and . . . misrepresenting whether he received docu-

ments which [we]re the subject of a particular hearing." By way of example, the hearing officer referenced the September 5, 2001, session, where Dr. Mileikowsky "disrupted the proceedings because he disagreed with [the hearing officer's] prohibition of his reference to his litigations in front of the Hearing Committee" and the session on November 29, 2001, where he "disrupted [a session] by falsely contending that he had not received a . . . letter . . . enclosing exhibits." The ruling further specifically described the December 17, 2001, session as one in which Dr. Mileikowsky engaged in "disorderly conduct and disruption of hearings."

The seventh basis was Dr. Mileikowsky's use of language in written and oral statements that "abuse[d] witnesses, the MEC's representatives, hospital administrators, and [the hearing officer]." For example, at the December 17, 2001, session, Dr. Mileikowsky called a witness "superficial and careless," stated that "'[the witness didn't] have the knowledge,'" and had an "'interest to see that [Dr. Mileikowsky's] practice goes down the tube.'" In a letter to the hearing officer, Dr. Mileikowsky accused an attorney for the MEC of "fabrications." In another letter, Dr. Mileikowsky said of the hearing officer that he "lie[s] by omission" and "[s]uffer[s] from the same delusions as [the MEC attorney]."

Finally, the hearing officer pointed to Dr. Mileikowsky's "continuing refusals to obey my rulings for the conduct of this hearing" evidenced at the December 17, 2001, session and in the letters that followed.

D. Administrative Appeal

The hearing officer's decision to terminate was appealed to another three-person appellate review body. The appellate review body affirmed, concluding that Dr. Mileikowsky "repeatedly disrupted hearing sessions and used personal invective and threatening language"; "repeatedly violated the Hearing Officer's order that he refrain from referencing his two

lawsuits brought against [the Hospital's] parent company and many Medical Staff physicians"; "refused to comply with Discovery required by [Business and Professions Code Code] Section 809 and the [Bylaws]"; and "entered into unauthorized ex parte communications with the entire Hearing [Committee] relating to the subject matter of the Hearing."

E. Dr. Mileikowsky's Writ Petition

After exhausting his administrative remedies, Dr. Mileikowsky filed a petition for writ of mandate in the superior court. In his first amended petition,[14] Dr. Mileikowsky alleged that after the related lawsuit was filed and a preliminary injunction issued prohibiting the Hospital from preventing Dr. Mileikowsky from exercising the privileges of an active status physician and surgeon or reporting to others that he had voluntarily resigned, the Hospital "purported to process [his] application in accordance with [its] By-Laws" but voted to deny it without hearing or notice. Dr. Mileikowsky alleged that he appealed the decision, and an administrative hearing commenced in October 2000. Then, in November, the Hospital "blatantly violated once again the preliminary injunction [in case no. B159733] by purporting to summarily suspend [Dr. Mileikowsky's] privileges on November 16, 2000." The Hospital upheld the summary suspension "in violation of the By-Laws, in violation of the preliminary injunction, and in violation of the due process clauses of the federal and state [C]onstitutions." Thereafter, the Hospital "purported to provide [Dr. Mileikowsky] with a combined hearing regarding his reappointment application and the summary denial of his staff privileges with a new Hearing Officer and a new Hearing Committee." That hearing was "illegally suspended on March 30, 2002 by [the hearing officer], who failed to obtain the approval of the [Hearing] Committee."

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[14] The original petition is not in our record.

The petition sought a new administrative hearing, and also asked that the hearing officer be appointed by the court or, alternatively, that the hearing be conducted entirely by the court.

F. Trial Court's Ruling

At the hearing on the petition, the trial court stated that the hearing officer's decision came to it with a "presumption of correctness" and that Dr. Mileikowsky had not met his burden of showing that the decision was not supported by the weight of the evidence. The court made particular reference to "one instance . . . where the reporter who was reporting [the hearing] threw up her hands and walked out because [Dr. Mileikowsky] kept interrupting, [and] she could not make any kind of an intelligible transcript of what was going on" and another where Dr. Mileikowsky "was shouting at people, [and] insisting on reading into the record a . . . ruling [the court] had made that was not relevant to any point being discussed at the time."

The court denied the writ petition on March 14, 2003. We quote from the court's order explaining its reasoning at length: "The administrative hearing was terminated based upon findings that [Dr. Mileikowsky] had repeatedly disrupted the hearings by disorderly conduct, defiance of the hearing officer's rulings made to control [Dr. Mileikowsky's] conduct, violation of the hearing officer's rulings concerning the admissibility of evidence, refusal of [Dr. Mileikowsky] to provide information requested from him relating to the charges against him despite orders by the hearing officer to do so, and [Dr. Mileikowsky's] repeated failure and refusal to obey orders of the hearing officer concerning the filing of briefs.

"The administrative record contains substantial evidence to support the administrative decision, and, under the circumstances, the court finds that the termination of the administra-

tive hearing was not arbitrary or capricious, and was not an abuse of discretion by the governing board.

"The administrative decision was the culmination of a long course of disruptive conduct by [Dr. Mileikowsky] since his application for staff privileges was initially denied on January 11, 2000. The administrative hearings have produced an administrative record that now fills ten cartons which, placed one on top of another, constitute a stack of documents almost nine feet high. [Dr. Mileikowsky] has been given more than an adequate opportunity to oppose administratively respondent's efforts to rid itself of his presence upon its medical staff. He is entitled to no more."

Judgment was entered on respondents' behalf. Dr. Mileikowsky moved for a new trial based on insufficient evidence to support the court's decision. The motion was denied. This appeal followed.

DISCUSSION

I

Standard of Review

The parties dispute the standard of review to be applied on appeal. Dr. Mileikowsky contends that we should examine the issues raised de novo. The Hospital insists that the rulings of the hearing officer and administrative review body must be upheld as long as they are supported by substantial evidence. In addition, the parties are in disagreement over whether the writ was properly taken under Code of Civil Procedure section 1085 (traditional or ordinary mandamus) or section 1094.5 (administrative mandamus).[15]

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[15] As explained in *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848 [41 Cal. Rptr. 2d 567]: "Statutes provide for two types of review by mandate: ordinary mandate and administrative mandate. [Citation.] The nature of the administrative action or decision to be reviewed determines the applicable type of mandate. [Citation.] In gen-

The parties' confusion is understandable. There are two distinct issues embedded in the seemingly simple question of whether to uphold the hearing officer's decision: (1) whether the hearing officer had the authority to suspend the hearing as a sanction under the Hospital's Bylaws and/or the provisions of the Business and Professions Code governing termination of physicians' hospital staff privileges; and (2) whether the administrative record supports the conclusion that Dr. Mileikowsky's conduct justified terminating the proceeding. A different standard of review applies to each issue.

The first essentially asks whether Dr. Mileikowsky was afforded the hearing required by the Business and Professions Code and the Bylaws. Failure to provide a hearing required by law or regulation is remedied by a petition for traditional mandate, as this court stated in *DeCuir v. County of Los Angeles* (1998) 64 Cal.App.4th 75 [75 Cal. Rptr. 2d 102]. There, the Civil Service Commission had refused to hold a hearing and made a decision based on review of written materials. The claimant contended he was excused from seeking review by way of ordinary mandate. We disagreed: "The commission's denial of a hearing is itself a reviewable determination. That was the context in which [the claimant's] claim was presented and reviewed. The fact that [the claimant] did not prevail does not establish that a petition for ordinary mandate will automatically fail. . . . [M]andate is not only available to review the action of the commission where there is a hearing, but is the appropriate procedure to test the commission's denial of a hearing." (*Id.* at p. 82.)

Moreover, determining whether hearing procedures complied with the relevant statutes and the Bylaws requires application of the rules of statutory interpretation and construction. In such cases, "'[t]he appropriate mode of review . . . is one

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eral, quasi-legislative acts are reviewed by ordinary mandate and quasi-judicial acts are reviewed by administrative mandate."

in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction. [Citation.]'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal. Rptr. 2d 1, 960 P.2d 1031].) Despite the deference given, "[t]he court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (*Id.* at p. 11, fn. 4.)

Yamaha dealt with interpretation of the underlying statute. The same standard applies to appellate review of an administrative body's interpretation of its own regulations: "As a general rule, the courts defer to the agency charged with enforcing a regulation when interpreting a regulation because the agency possesses expertise in the subject area. [Citation.] However, final responsibility for interpreting a statute or regulation rests with the courts and a court will not accept an agency interpretation which is clearly erroneous or unreasonable." (*Aguilar v. Association for Retarded Citizens* (1991) 234 Cal. App. 3d 21, 28 [285 Cal. Rptr. 515].)

The conclusion that traditional mandamus applies and review is de novo in situations similar to the present case was reached by the court in *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607 [113 Cal. Rptr. 2d 309], where the physician contended that the respondent hospital's medical staff Bylaws did not properly implement the provisions of the Business and Professions Code and that the notice given to him did not comply with the requirements of statute. (*Id.* at p. 618.) The court concluded that the physician based his challenge on the failure of respondents to comply with law, and that therefore, review would be under standards of traditional mandamus. (*Ibid.*) The court further recognized that "[i]n reviewing a trial court's ruling on a writ of mandate, an appellate court is 'ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial evidence. [Citation.]'" (*Ibid.*) However,

where the duty the petitioner seeks to enforce "is one derived from statute," and the question presented is "what does the statute require," the appellate court is "confronted with questions of law only, [and is] to address the legal issues de novo." (*Id.* at pp. 618-619.)

Similarly, in *Rosenblit v. Superior Court* (1991) 231 Cal. App. 3d 1434 [282 Cal. Rptr. 819], the physician filed a petition for writ of mandate seeking to reinstate his hospital staff privileges, primarily raising procedural issues such as whether he had sufficient notice of the charges against him and whether he had a meaningful opportunity to voir dire panel members. The court interpreted the question presented as "whether there was a fair trial and whether the [hospital] proceeded in a manner required by law." (*Id.* at p. 1443.) Findings by the trial court as to these types of matters represented "conclusion[s] of law," and were to be reviewed "de novo" by the appellate court based on independent review of the administrative record. (*Id.* at pp. 1442-1444.)

Once it is resolved whether hearing officers have the power under the statute and regulations to impose the equivalent of terminating sanctions, however, the issue becomes whether such sanctions should have been imposed in a particular case. Applying the law to a particular factual situation is a judicial or quasi-judicial function. Section 1094.5 of the Code of Civil Procedure is the provision that governs review of quasi-judicial administrative decisions. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 123 [109 Cal. Rptr. 799, 514 P.2d 111].) The scope of review under section 1094.5 was laid out by the Supreme Court in *Selby Realty Co. v. City of San Buenaventura*: "Subdivision (b) of section 1094.5 of the Code of Civil Procedure provides that the scope of inquiry in a mandamus proceeding brought to inquire into the validity of a final administrative order shall extend to whether the respondent has proceeded without or in excess of jurisdiction, whether there was a fair trial, and whether there

was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence." (10 Cal.3d at pp. 123-124.)

Our review of the issue of whether Dr. Mileikowsky's behavior warranted the sanction imposed is not resolved, however, by a determination of whether "the [administrative review body's] findings of fact are supported by substantial evidence," as respondents contend. Neither the appellate review body nor the Hearing Committee made any findings of fact based on the evidence presented with respect to the substantive charges against Dr. Mileikowsky. The "facts" on which the hearing officer relied to impose sanctions are better described as the procedural background, which is found in the administrative record and is not subject to serious dispute. Like a trial court confronted with a litigant who repeatedly disobeys court orders, the hearing officer exercised discretion in choosing how to respond. The question of whether the ultimate sanction should have been imposed is subject to the same standard of review as our review of a trial court's order imposing similar sanctions on a litigant: abuse of discretion. (See, e.g., *In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108 [8 Cal. Rptr. 3d 699].)[16]

II

Hearing Officer's Authority

"In 1989, the state Legislature enacted California Business and Professions Code section 809 et seq. for the purpose of

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[16] Our conclusion in this regard is supported by the Seventh Circuit's decision in *Chapman v. U.S. Commodity Futures Trading Commission* (7th Cir. 1986) 788 F.2d 408.) In affirming an agency decision to dismiss a proceeding due to failure to comply with a discovery order, the court said: "As this agency sanction was within statutory limits, it can be upset only if it reflects an abuse of discretion." (*Id.* at p. 411.)

opting out of the federal Health Care Quality Improvement Act of 1986 [citation], which was passed to encourage physicians to engage in effective peer review. California chose to design a peer review system of its own, and did so with the enactment of these sections. [Citation.] Section 809 provides generally that peer review, fairly conducted, is essential to preserving the highest standards of medical practice and that peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care. [Citation.] The statute thus recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts." (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at pp. 616-617, fn. omitted.)

Section 809 et seq. of the Business and Professions Code "delegates to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights" and "also defines what constitutes minimum due process requirements for the review process." (*Unnamed Physician v. Board of Trustees*, *supra*, 93 Cal.App.4th at p. 622.) "The statute allows for and encourages effective peer review, while at the same time it balances the interests of both the physician and the public in ensuring fair, nonarbitrary, and nondiscriminatory procedures. [Citations.] It does this by defining the minimum procedures required and by mandating strict compliance with the procedures outlined." (*Ibid.*)

Business and Professions Code section 809.2 sets forth the statutory requirements for hearing procedures. Under subdivision (a), the hearing is to be held either before an arbitrator or "a panel of unbiased individuals." Subdivision (b) provides that a hearing officer may be "selected to preside at a hearing held before a panel" and "shall not be entitled to vote." The

practitioner has the right to voir dire panel members and to challenge the impartiality of such members. Challenges are to be ruled on by "the presiding officer, who shall be the hearing officer if one has been selected." (Bus. & Prof. Code, § 809.2, subd. (c).)

Under subdivision (d) of Business and Professions Code section 809.2, the parties have the right to inspect and copy documents relevant to the charges and "[t]he failure by either party to provide access to this information at least 30 days before the hearing shall constitute good cause for a continuance." "The . . . presiding officer [that is, the hearing officer where one has been selected] shall consider and rule upon any request for access to information, and may impose any safeguards the protection of the peer review process and justice requires." (*Id.*, subd. (d).)

Under subdivision (f) of Business and Professions Code section 809.2, the parties are to "exchange lists of witnesses expected to testify and copies of all documents expected to be introduced at the hearing." "Failure to disclose the identity of a witness or produce copies of all documents expected to be produced at least 10 days before the commencement of the hearing shall constitute good cause for a continuance." (*Id.*, subd. (f).) Continuances may be granted "by the . . . presiding officer on a showing of good cause." (Bus. & Prof. Code, § 809.2, subd. (g).)

Subdivision (h) of Business and Professions Code section 809.2 requires a hearing to commence within 60 days after receipt of a request for hearing and to be completed "within a reasonable time, after a licentiate receives notice of a final proposed action or an immediate suspension or restriction of clinical privileges," unless the "presiding officer issues a written decision finding that the licentiate failed to comply with subdivisions (d) and (e) in a timely manner, or consented to the delay."

Finally, Business and Professions Code section 809, subdivision (a)(8) requires promulgation of "written provisions implementing Sections 809 to 809.8" to be included "in medical staff bylaws." And section 809.6, subdivision (a) provides that "[t]he parties are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with Sections 809.1 to 809.4, inclusive."

As we have seen, the Hospital did promulgate Bylaws that add further detail to the statutory procedures. Among other things, the Bylaws mandate rather than permit the appointment of a hearing officer "to preside at the evidentiary hearing." (Bylaws, art. VIII, § 3.D.) In line with the powers expressly granted by statute to the "presiding officer," the hearing officer is empowered to rule on challenges for bias (*id.*, § 3.F) and disputes regarding access to documents and other information (*id.*, § 3.G), and grant continuances (*id.*, § 3.I). In addition, "[t]he hearing officer shall act to maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence. He/she shall be entitled to determine the order of procedure during the hearing and shall make all rulings on matters of procedure and the admissibility of evidence." (Bylaws, art. VIII, § 4.B.) Finally, article VIII, section 3.G provides that disputes regarding requests for access to documents shall be submitted to the hearing officer "who may impose any safeguards deemed necessary" in the interests of fairness and to protect the peer review process.

The Bylaws also list various ways in which a practitioner can be deemed to have waived his or her right to a hearing. A waiver can occur if the practitioner fails to request a hearing "within the time and in the manner specified." (Bylaws, art. VIII, § 2.E.) Under article VIII, section 4.A, a hearing can be waived by "[a] practitioner who fails without good cause to appear and proceed" at the hearing. In addition, article VIII,

section 10.C provides that if after receipt of a notice of adverse recommendation or action, "a practitioner fails to make a required request or appearance or otherwise fails to comply with this Fair Hearing Plan or to proceed with the matter," he or she "shall be deemed to have consented to such adverse recommendation, action or result and to have voluntarily waived all rights to which he might otherwise have been entitled under the medical staff bylaws then in effect or under this Fair Hearing Plan with respect to the matter involved."

Noting that nothing in these provisions expressly permits the hearing officer to suspend the hearing based on the practitioner's conduct in disobeying orders or disrupting hearing sessions, Dr. Mileikowsky and amicus curiae Union contend that the hearing officer exceeded his authority and violated Dr. Mileikowsky's right to a hearing before his peers. Respondents concede that the power to terminate proceedings is not expressly set forth in the Bylaws or the relevant statutes, but contend that such power is reasonably inferable from existing provisions or the inherent power of a judicial or quasi-judicial officer.

As we have said, our responsibility is to interpret the governing statutes and regulations with due deference to the appellate review body's interpretation. (See, e.g., *Aguilar v. Association for Retarded Citizens*, *supra*, 234 Cal. App. 3d at p. 28.) "To determine the intent [of a statute or regulation], the court turns first to the words, attempting to give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage. [Citations.] The words must be construed in context in light of the nature and obvious purpose of the regulation where they appear. [Citation.] The various parts of an enactment must be harmonized in context of the framework as a whole. [Citations.] The regulation [or statute] must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the agency, practical rather than technical in

nature, and which, when applied, will result in wise policy rather than mischief or absurdity." (*Id.* at pp. 28-29.)

Although the Business and Professions Code does not specifically speak in terms of termination of proceedings or waiver of rights, section 809.2, subdivision (h), expressly relieves hospitals of their obligation to commence a hearing "within 60 days after receipt of the request" or complete a hearing "within a reasonable time" where the practitioner fails to comply with subdivisions (d) and (e) pertaining to discovery. In addition, the statute contemplates that hearings will have a "presiding officer" who will render rulings on procedural matters and "may impose any safeguards the protection of the peer review process and justice requires." (Bus. & Prof. Code, § 809.2, subd. (d).) The statutes further contemplate that hospitals will promulgate Bylaws to implement the statutory provisions that will be binding on the parties. (*Id.*, § 809.6.)

The Bylaws go into greater detail concerning the various ways in which rights may be waived. Article VIII, section 10.C, in particular, is quite broad—any failure to comply with the Fair Hearing Plan outlined in the Bylaws may be deemed a waiver of the right to contest the adverse action. In its April 2001 ruling reversing the decision to terminate the previous hearing, the appellate review body noted that article VIII, section 10.C of the Bylaws "provides the basis for waiver of rights under the Bylaws in a broad range of circumstances."

The hearing officer's conclusion that he had the power to suspend the hearing based on the conduct of the practitioner is in line with the relevant statutes and the Bylaws as interpreted by the appellate review body. His decision that the rules permit termination of a hearing when the practitioner is repeatedly disruptive, disdainful of the hearing officer's authority, and flagrantly violates the rules pertaining to discovery and documentary exhibits was not "clearly erroneous" or "unreasonable," and was affirmed by the appellate review

body. (See *Aguilar v. Association for Retarded Citizens*, *supra*, 234 Cal. App. 3d 21.) We see no basis for reaching a contrary interpretation.

Moreover, even if the power to control proceedings was not specifically enunciated in the relevant statutes and By-laws, hearing officers have "wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. [Citations.]" (*Cella v. United States* (7th Cir. 1953) 208 F.2d 783, 789.) Administrative agencies are "'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" (*Ibid.*, quoting *Federal Communications Comm. v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 143 [84 L. Ed. 656, 60 S. Ct. 437], accord, *Fairbank v. Hardin* (9th Cir. 1970) 429 F.2d 264, 267.) The pronouncements are in accord with the fundamental rule that judges have "inherent power to control litigation before them." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 [67 Cal. Rptr. 2d 16, 941 P.2d 1203].) In order to ensure that the hearings mandated by the Business and Professions Code proceed in an orderly fashion, hearing officers must have the power to control the parties and prevent deliberately disruptive and delaying tactics. The power to dismiss an action and terminate the proceedings is an important tool that should not be denied them.

Our conclusion that a hearing officer may terminate a hearing as a sanction for flagrant disobedience to orders is supported by the case of *Metadure Corp. v. United States* (1984) 6 Cl. Ct. 61. The case involved a hearing before the Armed Services Board of Contract Appeals (Board). Its regulations stated that "[i]f any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers necessary to the just and expeditious conduct of the appeal.[17]" (6 Cl. Ct. at p. 66, fn. 3, quoting 32 C.F.R.

[17] Hearings before the Board were referred to as "appeals."

App. A, at 435 (1982).) The administrative law judge directed the plaintiff to provide access to its books and records. The order was not complied with, and the administrative law judge imposed a sanction of dismissal. Plaintiff argued before the Court of Claims that the sanction was arbitrary and capricious. The court noted that, just as a court enjoys "inherent power enabl[ing] it to invoke dismissal as a sanction in situations involving disregard of orders" and "great leeway in formulating orders to control discovery," the Board's administrative law judges "by virtue of their case management authority, are given broad discretion to manage the litigation on their dockets." (*Id.* at pp. 66-67.) In the case before the court, the administrative record consisted "primarily of voluminous submissions dealing with a major discovery dispute concerning not the nature or scope of discovery, but whether plaintiff would allow discovery to be completed" resulting in "[s]quandering the resources of the administrative tribunal" and "unfair[ness] to other litigants." (*Id.* at p. 67.) Consequently, the court had no difficulty holding that "the administrative law judge acted well within his authority in imposing a preclusionary sanction . . . because of plaintiff's willful failure to comply with the . . . order." (*Id.* at p. 68.)

Dr. Mileikowsky argues alternatively that the decision to terminate the hearing should have been made by the Hearing Committee rather than the hearing officer acting alone. As can be seen from the above-quoted provisions, nothing in the Bylaws or relevant statute suggests that the Hearing Committee rather than the presiding officer or hearing officer is to decide procedural questions. To the contrary, the provisions we have quoted uniformly indicate that procedural matters are addressed to the presiding officer or hearing officer. The alternative that Dr. Mileikowsky advocates—that contested procedural issues be argued to and decided by the Hearing Committee—is simply unworkable. The panel assembled in the present case consisted of busy medical practitioners. The record reflects the difficulty experienced in convening evi-

dentiary hearing sessions two or three evenings a week for a few hours at a time due to the conflicting schedules of all concerned. If such panels were to be charged with determining procedural matters in addition to the difficult substantive questions, there would be little hope of having these types of proceedings resolved in any reasonable time.

We acknowledge the concern expressed by amicus curiae Association that too much power in the hands of the hearing officer could lead to the loss of the statutorily-mandated peer review. The Association fears that a hearing officer might be tempted to impose terminating sanctions when a difficult defending physician appears to be scoring points with the peer committee. Moreover, the Association points out, the Bylaw's prohibition on representation by legal counsel during the hearing session guarantees that there will be some deviance from standard litigation practices and courtesies. But our recognition of a hearing officer's *authority* to impose the ultimate sanction does not mean that termination of hearings will be routine or that gratuitous impositions will be upheld. Hearing officer decisions to terminate proceedings due to the alleged violation of procedural rules will always be reviewable in court. Courts are reluctant to deprive a litigant of the opportunity to have the substantive merits of his or her case be heard except in egregious circumstances. An extensive record of misbehavior would have to exist to justify a decision to deprive a practitioner of the peer review afforded by statute. It is to the issue of whether the decision to terminate the hearing was justified by the record in the present situation that we now turn.

III

Appropriateness of Terminating Sanction

As we have seen, the hearing officer gave eight reasons for imposing a terminating sanction: (1) the brief Dr. Mileikowsky addressed to the members of the Hearing Committee; (2) Dr. Mileikowsky's continuous references to his lawsuit

and misrepresentations concerning the rulings made; (3) Dr. Mileikowsky's violation of orders regarding discovery; (4) Dr. Mileikowsky's failure to exchange his exhibits 10 days be fore the commencement of the hearing sessions; (5) Dr. Mileikowsky's failure to submit any briefing concerning the allegations that he failed to cooperate in peer review; (6) Dr. Mileikowsky's conduct in disrupting hearing sessions by yelling and disobeying the hearing officer's ruling regarding the questioning of witnesses, and misrepresenting whether he received documents; (7) Dr. Mileikowsky's use of abusive or inappropriate language in written and oral statements; and (8) Dr. Mileikowsky's general refusals to obey the hearing officer's rulings for the conduct of the hearing.

In affirming the ruling, the appellate review body focused on four of the reasons given: (1) that Dr. Mileikowsky repeatedly disrupted hearing sessions and used personal invective and threatening language; (2) that he repeatedly violated the hearing officer's order that he refrain from referencing his related lawsuit; (3) that he refused to comply with discovery required by Business and Professions Code section 809 and the Bylaws; and (4) that he entered into unauthorized "ex parte" communications with the entire Hearing Committee.

Dr. Mileikowsky and amicus curiae Association focus on the first reason expressed by the hearing officer, and contend that sending the post-hearing brief to the members of the Hearing Committee was not improperly ex parte because it was served on both sides. It is clear from the context that the hearing officer was not motivated by the belief that the brief had not been served on the other side. After the final hearing session on December 17, 2001, the hearing officer asked for briefing on the issues of appropriate sanctions short of termination and for suggestions on how hearing sessions could proceed in an orderly fashion in the future. After receiving the parties' briefs, the hearing officer made a ruling on how further sessions would proceed. Dr. Mileikowsky was openly

defiant and made clear that he did not intend to accede to the hearing officer's ruling. The hearing officer then asked for briefing on whether Dr. Mileikowsky's refusal to proceed under the rules laid down represented a waiver. Dr. Mileikowsky attempted to circumvent him by addressing his response directly to the Hearing Committee. The hearing officer had previously ruled that procedural issues were to be addressed to him alone, and repeatedly refused Dr. Mileikowsky's numerous requests that he be allowed to petition the Hearing Committee for review of procedural rulings. The hearing officer was outraged about the brief not because it was "ex parte," but because it represented a flagrant disregard of prior rulings and confirmed Dr. Mileikowsky's cavalier attitude toward the authority of the hearing officer.

It is important to keep in mind that the hearing officer's final series of requests for briefing on appropriate sanctions and hearing procedures represented the culmination of numerous prior attempts to induce Dr. Mileikowsky to respect the hearing officer, the hearing process, and the requirements imposed on him by the statutes and Bylaws. Dr. Mileikowsky had repeatedly failed to supply documents requested and had already suffered lesser sanctions as a result. He had failed to supply an exhibit list or copies of exhibits he intended to use, and had been forbidden to introduce exhibits until he complied with the rules pertaining to exchange of exhibits. In defiance of that order, he repeatedly attempted to show new documents to witnesses and was argumentative when reminded of the hearing officer's ruling. Seeking to gain control over the issues, the hearing officer had asked the parties to provide written statements to be distributed to the Hearing Committee with respect to the medical files underlying the charges that Dr. Mileikowsky failed to cooperate with peer review. Dr. Mileikowsky disregarded that request. Dr. Mileikowsky repeatedly attempted to bring up the related lawsuit when cross-examining witnesses to create the impression that court orders had been violated, and was argumenta-

tive with the hearing officer when he was cut off. Indeed, Dr. Mileikowsky's habitual response to adverse evidentiary rulings was to argue, accuse the hearing officer of bias, or make contemptuous comments about the hearing officer and/or the hearing process.

As we have said, courts are reluctant to approve imposition of the ultimate sanction unless it is clear from the record that the transgressing party left no viable alternative. In *Newland v. Superior Court* (1995) 40 Cal.App.4th 608 [47 Cal. Rptr. 2d 24], this Court explained why: "The rule that a sanction order cannot go further than is necessary to accomplish the purpose of discovery is some 35 years old in California, and is rooted in constitutional due process." (*Id.* at p. 613, citing *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal. App. 2d 300 [10 Cal. Rptr. 377].) In *Caryl Richards*, the defendant failed to adequately respond to discovery about the chemical properties of its product even after being ordered to do so. The trial court ordered that defendant's answer be stricken and its default entered. The appellate court in *Caryl Richards* reversed, and we quoted and adopted its reasoning in *Newland*: "'While under the statute the court undoubtedly has the power to impose a sanction which will accomplish the purpose of discovery, when its order goes beyond that and denies a party any right to defend the action or to present evidence upon issues of fact which are entirely unaffected by the discovery procedure before it, it not only abuses its discretion but deprives the recalcitrant party of due process of law. "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."'" (*Newland*, *supra*, at p. 614, quoting *Caryl Richards*, *supra*, at p. 305.)

Numerous other appellate courts have held that imposition of a terminating sanction by the trial court is excessive where the party's conduct is not extreme and other options were available to protect the integrity of the litigation process. (See, e.g., *Midwife v. Bernal* (1988) 203 Cal. App. 3d 57, 64 [249 Cal. Rptr. 708] ["Constitutional due process 'imposes limitations on the power of courts, even in aid of their own valid processes, to order discovery sanctions that deprive a party of his opportunity for a hearing on the merits of his claim'"]; *Thomas v. Luong* (1986) 187 Cal. App. 3d 76, 81 [231 Cal. Rptr. 631] [holding that courts "should not deprive a party of all right to defend an action if the discriminating imposition of a lesser sanction will serve to protect the legitimate interests of the party harmed by the failure to provide discovery"]; *Morgan v. Ransom* (1979) 95 Cal. App. 3d 664, 670 [157 Cal. Rptr. 212] [court held that the "sanction of peremptory dismissal, without consideration of the merits, is fundamentally unjust unless the conduct of a plaintiff is such that the delinquency interferes with the court's mission of seeking truth and justice"].)

There is no question, however, that in some egregious circumstances terminating sanctions are appropriate. In *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611 [26 Cal. Rptr. 2d 786], for example, defendants failed to respond to discovery, failed to respond to letters requesting responses, and disregarded a court order issued in a hearing on a motion to compel. After the trial court granted a request for sanctions by striking the answer, defendants served responses and moved for reconsideration, claiming that the sanction was too drastic since it was only their first effort at drafting responses. The Court of Appeal rejected that argument: "Defendants' characterization of their further responses as being their 'first effort' to respond, while literally correct, is nonetheless misleading. The point that defendants fail to acknowledge is that, while this may have been their first [attempt] to respond, it was not plaintiff's first [attempt] at receiving straightforward re-

sponses. Defendants chose to ignore the many attempts, both formal and informal, made by plaintiff to secure fair responses from them. Accordingly, we find no abuse of discretion by the trial court." (*Id.* at p. 1618.)

In *Lang v. Hochman* (2000) 77 Cal.App.4th 1225 [92 Cal. Rptr. 2d 322], the court reviewed cases where terminating sanctions were upheld, and discerned the following basic scenario: "[T]he trial court imposed a terminating sanction after considering the totality of the circumstances: conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery. In each case, the offending party spent months avoiding or evading discovery." (*Id.* at p. 1246.) The same pattern appeared in the case before the court in *Lang*. The history of this case showed that "[defendant] did not comply with the court's orders. The referee viewed [defendant's] constant declarations that it fully complied with the discovery request as 'disingenuous at best.' The referee and the court found [defendant's] lack of diligence to be willful, tactical, egregious and inexcusable. [Defendant's] conduct prevented [plaintiff] from preparing for trial since the documents were necessary to [his] objective of showing misappropriation and commingling of funds. The court, over the course of the year, progressively sanctioned [defendant]. Still, [defendant] did not produce the requested documents. [P] The trial court and the referee conducted many hearings and afforded [defendant] numerous opportunities to comply with the orders." (*Id.* at p. 1247.) On that procedural background, the court upheld the trial court's ruling.

Our review of the administrative record convinces us that the hearing officer did not abuse his discretion in terminating the hearing. Dr. Mileikowsky was repeatedly sanctioned, repeatedly warned, and repeatedly importuned to treat the hearing officer and the hearing process with respect. By the time the hearing officer imposed the terminating sanction, less

severe sanctions had already been tried with respect to discovery and exhibits. They obviously had little impact, as Dr. Mileikowsky neither produced the documents nor prepared his exhibits or exhibit list. Despite the ineffectuality of prior sanction orders, the hearing officer initially hoped to impose lesser sanctions to deal with the disruptive conduct at the hearing sessions. But Dr. Mileikowsky threatened to defy the ruling if sessions were reconvened. The hearing officer could not disregard Dr. Mileikowsky's disdain for his authority forever. Nor could he permit Dr. Mileikowsky to continue to unnecessarily prolong the proceedings. The Hospital was entitled to closure, and the Hearing Committee members were entitled to get on with their lives. The decision to terminate the hearing was justified under the circumstances.

IV

Substantive Issues

Dr. Mileikowsky and amicus curiae Association devote considerable portions of their briefs to the contention that the summary suspension was unwarranted. Amicus curiae Consumer Attorneys express concern that Dr. Mileikowsky's staff membership was withdrawn in retaliation for his agreement to testify in a medical malpractice action. We are not called on here to review the merits of the decision to suspend Dr. Mileikowsky's hospital privileges or the decision to refuse his request for reappointment. The sole issue presented is whether the hearing officer's ruling, upheld by the appellate review body, terminating the administrative proceeding based on Dr. Mileikowsky having waived his rights to proceed by his behavior was correct or whether instead Dr. Mileikowsky's due process rights were violated by premature adjournment of the hearing.

A similar debate arose in *Bollengier v. Doctors Medical Center* (1990) 222 Cal. App. 3d 1115 [272 Cal. Rptr. 273], where the physician claimed that the charges against him

were procedurally invalid. When the hearing officer refused to dismiss the charges, he sought a writ of mandate from the superior court, arguing he should not be required to stand trial on charges which were procedurally defective. On appeal from the order denying the petition based on failure to exhaust administrative remedies, the parties presented "extensive arguments regarding the facts surrounding the suspension" and provided "conflicting evidence to support their respective positions." (*Id.* at p. 1122.) The physician presented evidence of "his outstanding surgical skill and 'legendary' patient care" and alleged that the suspension was "economically motivated." (*Ibid.*) The hospital set forth evidence of "'gross misconduct'" and argued that summary suspension was "necessary to protect patients and others from [the physician]." (*Ibid.*) The Court of Appeal refused to take the bait, limiting itself to the procedural issue presented: "Factual findings have not yet been made in this case and, as is evident from the arguments, many of the facts are hotly contested. This court cannot make the required factual determinations. . . . Thus, all of the discussion and exhibits regarding the disputed facts are irrelevant to the issues before us." (*Id.* at pp. 1122-1123.)

Turning to the procedural issues, the court held that the trial court had correctly ruled that the physician failed to exhaust his administrative remedies. The physician contended that administrative remedies were inadequate "because there is no mechanism for an interim review of the claimed procedural deficiencies." (*Bollengier*, *supra*, 222 Cal. App. 3d at p. 1129.) The court concluded that the lack of opportunity for interim review did not render the administrative process meaningless: "The fact petitioner is facing numerous charges of misconduct and claims procedural irregularities took place, does not warrant court intervention before the administrative proceedings are concluded." (*Ibid.*) Moreover, to the extent the physician contended that summary suspension was invalid because need for immediate action was not present and

the suspension was done in bad faith, these were factual challenges that required resolution of disputed facts. (*Id.* at p. 1131.)

Dr. Mileikowsky and amicus curiae Association raise arguments that echo those in *Bollengier*, contending that the Hospital's summary suspension decision was taken in bad faith and in the absence of evidence of imminent harm. These were the issues being litigated before the Hearing Committee. Dr. Mileikowsky's actions caused the hearing to be terminated and prevented the Hearing Committee from issuing a decision on the merits. As a result, like the court in *Bollengier*, we do not reach the substantive issues.

DISPOSITION

The judgment is affirmed.

Hastings, Acting P. J., and Grimes, J.,* concurred.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 03/14/03	DEPT.: 86
HONORABLE: DAVID P. YAFFE, JUDGE	DEPUTY CLERK: C. HUDSON
HONORABLE:	M. LOMELI, COURTROOM ASST.
JUDGE PRO TEM: 6	ELECTRONIC RECORDING MONITOR:
Deputy Sheriff: NONE	Reporter: D. CASE, CSR #8739

BS079131
9:30 am

GIL N MILEIKOWSKY

VS.

TENET HEALTHSYSTEM ENCINO TARZA
170.6 JANAVS BY RESPONDENT

Plaintiff Counsel: ROGER J. DIAMOND (X)

Defendant Counsel: ANNA M. SUDA
JAY D. CHRISTENSEN (X)

NATURE OF PROCEEDINGS:

PETITIONER, GIL N. MILEIKOWSKY, M.D.'S MOTION FOR PEREMPTORY WRIT OF ADMINISTRATIVE MANDAMUS:

Matter comes on for trial and is argued.

The request for judicial notice by petitioner and respondent is denied; the petition for writ of mandate is denied.

The request by both parties for judicial notice is denied because the materials that the court is requested to notice are not relevant to the issues raised by the petition.

Petitioner challenges an administrative decision made by the governing board of the Encino-Tarzana Regional Medical Center, on July 25, 2002, terminating an administrative hearing in which petitioner was contesting the termination of his medical staff membership and clinical privileges at the Encino-Tarzana Regional Medical Center. The administrative hearing was terminated based upon findings that petitioner had repeatedly disrupted the hearings by disorderly conduct, defiance of the hearing officer's rulings made to control petitioner's conduct, violation of the hearing officer's rulings concerning the admissibility of evidence, refusal of petitioner to provide information requested from him relating to the charges against him despite orders by the hearing officer to do so, and petitioner's repeated failure and refusal to obey orders of the hearing officer concerning the filing of briefs.

The administrative record contains substantial evidence to support the administrative decision, and, under the circumstances, the court finds that the termination of the administrative hearing was not arbitrary or capricious, and was not an abuse of discretion by the governing board.

The administrative decision was the culmination of a long course of disruptive conduct by petitioner since his application for staff privileges was initially denied on January 11, 2000. The administrative hearings have produced an administrative record that now fills ten cartons which, placed one on top of another, constitute a stack of documents almost nine feet high. Petitioner has been given more than an adequate opportunity to oppose administratively respondent's efforts to rid itself of his presence upon its medical staff. He is entitled to no more.

The administrative record is ordered forthwith returned to the party who lodged it, to be preserved without alteration until the Judgment herein is final, and to be forwarded to the Court of Appeal in the event of an appeal.

Counsel for respondent is to submit a proposed judgment to this department within 10 days together with a proof of service showing that a copy has been served upon opposing counsel by hand delivery or FAX. The court will hold it for 10 days before signing and filing it.

APPENDIX E

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

DATE: 06/16/03	DEPT.: 86
HONORABLE: DAVID P. YAFFE, JUDGE	DEPUTY CLERK: C. HUDSON
	M. LOMELI, CRT. ASST.
HONORABLE:	ELECTRONIC RECORDING MONITOR:
JUDGE PRO TEM: 4	
Deputy Sheriff: NONE	Reporter: D. CASE, CSR #8739

BS079131
9:30 am

GIL N MILEIKOWSKY

VS.

TENET HEALTHSYSTEM ENCINO TARZA
170.6 JANAVS BY RESPONDENT

Plaintiff Counsel: ROGER J. DIAMOND (X)

Defendant Counsel: ANNA M. SUDA (X)
STEPHEN G. AUER (X)

NATURE OF PROCEEDINGS:

MOTION FOR NEW TRIAL;

Matter comes on for hearing and is argued.

Petitioner's motion for new trial is denied.

Petitioner fails to establish that the administrative decision made by the governing board of the Encino-Tarzana Regional Medical Center, on July 25, 2002, was against law or that it was not supported by substantial evidence.

The Administrative Record is ordered forthwith returned to the party who lodged it, to be preserved without alteration until the Judgment herein is final, and to be forwarded to the Court of Appeal in the event of an Appeal.

APPENDIX F

CERTIFICATION OF ACTON OF ENCINO-TARZANA REGIONAL MEDICAL CENTER

It is certified that the attached Order and Findings in the Matter of the Summary Suspension and Denial of the Reappointment Application of Gil N. Mileikowsky was duly adopted as an action of the Governing Board of the Encino-Tarzana Regional Medical Center on July 25, 2002.

/s/ Lee Kanon Alpert
Lee Kanon Alpert
Chair

Appellate Review Body
Of the Governing Body of
Encino-Tarzana Regional Medical Center

In The Matter Of the Summary)
Suspension and Denial of the) ORDER AND FINDINGS
Reappointment Application of)
Gil N. Mileikowsky, M.D.)

INTRODUCTION

On January 11, 2000, the Medical Executive Committee (the "MEC") of Encino-Tarzana Regional Medical Center (the "Medical Center") recommended the denial of the reappointment of Gil Mileikowky, M.D. to the Medical Staff of the Medical Center. Dr. Mileikowsky was granted a hearing before a Judicial Review Committee ("JRC") to contest this recommendation. In October, 2001 the JRC composed of Dr. Mileikowsky's peers at the medical Center determined that Dr. Mileikowsky had waived his right to a hearing because of his failure to respond to discovery requests, the subject of which were key to the issues at hand.

Dr. Mileikowsky appealed this decision to the Governing Body of the Medical Center. On April 26, 2001, the Appellate Review Body of the Governing Body remanded the matter for a new hearing and imposed evidentiary standards on Dr. Mileikowsky.

On November 26, 2000 Dr. Mileikowsky's clinical privileges at the Medical Center were summarily suspended due to complaints of Dr. Mileikowsky's unprofessional conduct and violation of security measures placed on him by Medical Center administration. On November 28, 2000 the MEC voted to continue the summary suspension and to terminate Dr. Mileikowsky's Medical Staff membership and clinical privileges. Dr. Mileikowsky requested and was provided a hearing to contest these actions.

Dr. Mileikowsky's two hearings were consolidated and action taken by the Hearing Officer at the Consolidated Hearing is the subject of this appeal.

On January 11, 2001, Dr. Mileikowsky commenced the voir dire of the Hearing Officer who was approved without challenge. After five sessions of voir dire of his peers, on August 21, 2001 eight physicians were approved to the JRC panel.

On March 30, 2002, after numerous hearing sessions, correspondence, motions by the parties and orders by the Hearing Officer, the Hearing Officer terminated the Consolidated Hearing due to the conduct of Dr. Mileikowsky. At that time, the MEC was still in the process of presenting its case. Dr. Mileikowsky appealed this decision to the Governing Body which appointed a three person Appellate Review Body. The Appellate Review Body, after preliminary motions and orders, heard the Appeal on July 2, 2002. This is the Order and Findings of the Appellate Review Body which is recommended for approval by the Governing Body pursuant to Article VIII, Section 7.I. of the Medical Staff Bylaws.

ORDER

After hearing and due deliberation, the Appellate Review Body affirms the decision of the Hearing Officer that Dr. Mileikowsky waived his right to a hearing and that Dr. Mileikowsky's hearing be terminated. The Appellate Review Body concludes that Dr. Mileikowsky received a fair hearing and that the Hearing Officer's decision was reasonable.

FINDINGS

The following findings are made by the Appellate Review Body:

1. *A Hearing Officer at a JRC Hearing established pursuant to California Business and Profession's Code Section 809 et. seq. and the Medical Staff Bylaws has the legal authority to terminate such Hearing based on misconduct of the physician requesting and participating in the Hearing.* When the California legislature enacted statutory provisions regarding peer review, it stated in its preamble that:

> "Peer review, fairly conducted, is essential to preserving the highest standards of medical practice.
>
> Peer review which is not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care."[1]

In order for per review to meet these standards, it must be participated in by all parties in accordance with the law and bylaws established by the organized Medical Staff. It is up to the Hearing Officer to assure that the hearing is a fair process for all parties. The Medical Staff Bylaws provide that:

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[1] Business and Professions Code Sections 809(a)(3) and (4).

> "The hearing officer shall act to maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence."[2]

When a physician acts to prevent the process of peer review from taking place, the Hearing Officer must act to assure a fair proceeding for all parties. As stated by the Hearing Officer in his order:

> ". . . [the] practitioner has an obligation to participate in peer review in good faith and to abide by the rules governing peer review. Any failure to do so threatens one of the pillars upon which protection of the public against substandard care rests. To permit a physician to flaunt the peer review process by flagrant violations of rules and procedures governing that process is unacceptable."[3]

We concur with this. Just as in the court system, there must be a remedy when a party deliberately sabotages an administrative or judicial process. A fair hearing means fair to both parties, including the Medical Executive Committee as well as the physician.

2. *The decision of the Hearing Officer to terminate the Hearing in the is matter was reasonable based on the evidence.* The Record on Appeal reveals the following instances of misconduct by Dr. Mileikowsky:

a. Dr. Mileikowsky repeatedly disrupted hearing sessions and used personal invective and threatening language. The hearing transcript is replete with examples of his disorderly conduct.[4] Dr. Mileikowsky re-

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[2] Medical Staff Bylaws Article VIII, Section 4.B.

[3] March 30, 2002 Ruling, Hearing Officer's Order, Page 2, Lines 1-5.

[4] See *Hearing Transcript*, September 5, 2001 and November 29, 2001.

peatedly misrepresented whether he received documents and frequently criticized the Hearing Officer's rulings. There are written and transcript examples of abuse of witnesses, MEC representatives, Medical Center administrators and MEC Counsel. Even at the Appellate Review Hearing, when represented by counsel, Dr. Mileikowsky referred to MEC counsel Jay Christensen as follows:

> ". . . I just imagine myself showing the work of Mr. Christensen to Goebbels. His reaction would be prima, superb lies ... A tissue of lies very skillfully put together" and further "have no illusions, behind the smile of Mr. Christensen lies a criminal ..." and "so look at the facts and ask yourself, despite the distinguished gift wrapping of Mr. Christensen, he is lying, is he another Arthur Anderson . . ."[5]

Further, verbally and in writing, Dr. Mileikowsky openly defied the Hearing Officer's rulings made to control Dr. Mileikowsky's conduct.

> b. Dr. Mileikowsky repeatedly violated the Hearing Officer's order that he refrain from referencing his two lawsuits brought against the Medical Center's parent company and many Medical Staff physicians. The Hearing Officer concluded that, since such lawsuits were still in process, these pleadings would be prejudicial to either party without final orders. Despite this, Dr. Mileikowsky repeatedly, and often falsely, referred to pleadings in the lawsuits.[6]

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[5] *Appellate Hearing Transcript*, dated July 2, 2002, Page 72, Lines 2-4; and 6-7; Page 73, Line 25; Page 74, Line 1; and Page 76, Lines 13-15.

[6] *Hearing Transcripts* dated September 5, 2001, November 29, 2001, December 3, 2001 and December 17, 2001.

c. Dr. Mileikowsky refused to comply with Discovery required by Section 809 and the Medical Staff Bylaws. The Record on Appeal indicated clearly that Dr. Mileikowsky refused to provide information requested by the MEC and required by law which directly related to the charges against him and which were specifically ordered by the Hearing Officer. Particularly significant was his failure to provide documents directly related to his suspension and termination from the Medical Center at Cedars-Sinai Medical Center.[7] This is the same failure which led the Medical Staff to conclude that he had not cooperated with his reapplication in 1999.

In addition, despite orders of the Hearing Officer, Dr. Mileikowsky never produced a full exhibit list as required by law and the Medical Staff Bylaws. This caused disruption to the Hearing process when Dr. Mileikowsky attempted to introduce previously unannounced documents. A similar instance occurred minutes before the current Appellate Review Hearing when Dr. Mileikowsky attempted to introduce an unannounced "reply brief" which was not agreed to or even requested by him during the pre-hearing procedural discussions.

d. Dr. Mileikowsky entered into unauthorized ex parte communications with the entire Hearing Panel relating to the subject matter of the Hearing. ON or about March 18 and 19, 2002, Dr. Mileikowsky personally delivered to each member of the Hearing Panel a 35

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[7] Rulings dated January 12, 2002, January 19, 2001, February 16, 2001, March 1, 2001, March 14, 2001, March 26, 2001, April 3, 2001, April 12, 2001, June 11, 2001, July 11, 2001, August 28, 2001, September 5, 2001, October 1, 2001, October 12, 2001, December 26, 2001 (Hearing Officer's Correspondence, Tabs 5, 8, 13, 15, 21, 23, 24, 25, 34, 42, 48, 51, 53, 54 and 69, respectively).

page typewritten brief, a one page letter from him and two physician advisors and copy of a letter to the Hearing Officer from the two physician advisors which was falsely dated. Dr. Mileikowsky's brief contained misrepresentations which we conclude were intended to mislead the Hearing Panel. This ex parte communication was done by Dr. Mileikowsky despite warnings by the Hearing Officer and a letter from Dr. Mileikowsky dated October 22, 2001 alleging such communication had occurred by the MEC. We believe that Dr. Mileikowsky's communication with the Hearing Panel severely prejudiced the MEC. We question whether the Hearing could have continued with this Panel after Dr. Mileikowsky's ex parte action.

3. *Dr. Mileikowsky's right to a fair hearing has not been violated by actions of the Hearing Officer.* A review of the Hearing transcript illustrates a process in which the Hearing Officer provided Dr. Mileikowsky ample opportunity to comply with the legal processes required of him. For instance, the Hearing Officer issued 14 rulings in 12 months and granted seven extensions trying to obtain documents from Dr. Mileikowsky as required by law. (See Footnote 7, *supra*.) The Hearing Officer entered an order for both parties to submit briefs regarding Dr. Mileikowsky's failure to cooperate in the Medical Staff peer review process. Despite five warnings by the Hearing Officer, Dr. Mileikowsky failed to submit such a brief. Hearing sessions were scheduled to meet the needs of Dr. Mileikowsky's vacation and seminar schedule.

   The most convincing illustrations of Dr. Mileikowsky's refusal to cooperate with legal procedures, despite the efforts of others to safeguard his rights, occurred in the past actions of hearing panels, appellate reviews and Superior court actions, all of which are a part of the

Record on Appeal. In the first hearing regarding the denial of Dr. Mileikowsky's reappointment, the Hearing Panel determined in the middle of the Hearing that Dr. Mileikowsky had waived his right to a hearing due to this behavior. While the Governing Board sent the matter back for a new hearing, it issued evidentiary sanctions against Dr. Mileikowsky for his failure to produce evidence and delay of the Hearing.

In the Hearing upon which this appeal is based, the Hearing Officer terminated Dr. Mileikowsky's hearing due to his failure to cooperate with the legal process.

Finally, in Dr. Mileikowsky's Court Cases, on April 24, 2002, the Superior Court entered orders for Terminating Sanctions due to the conduct of Dr. Mileikowsky. To quote the Discovery Referee in regards to Dr. Mileikowsky as petitioner:

> "Pursuant to CCP 2023(a), the Discovery Referee finds that respondents' motion for terminating sanctions and monetary sanctions should be GRANTED. Petitioner has demonstrated a pattern of promises and stipulations for the production of discovery responses that are unfulfilled. Instead of production, petitioner has changed counsel and repeated the pattern of delay and non-production. The Referee finds this repetition to be obstructive and willful, and in violation of petitioner's responsibility to participate in discovery and to comply with stipulations and court orders. Sanctions are warranted under CCP 2023(a)(3),(4), and (7)."[8]

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[8] Report and Recommendations of Discovery Referee, *Gil N. Mileikowsky, MD v. Tenet Health System, et al.*, No. BS 056125 related to Case No. BC 233153.

A Hearing Officer, a Discovery Referee and a Superior Court Judge have previously terminated hearings due to Dr. Mileikowsky's conduct. We believe the Hearing Officer was correct in taking the same action in the matter which is the subject of this appeal.

ADOPTED:

/s/ Louanne Kennedy	7/25/02
Louanne Kennedy	Date
/s/ Barry Pascal	7/25/02
Barry Pascal	Date
/s/ Keith Weaver	7/25/02
Keith Weaver	Date

APPENDIX G

ENCINO-TARZANA REGIONAL MEDICAL CENTER

March 30, 2002
RULING TERMINATING HEARING OF MISCONDUCT
BY DR. MILEIKOWSKY

In re the matter between

MEDICAL EXECUTIVE COMMITTEE OFENCINO-TARZANA REGIONAL MEDICAL CENTER,

and

GIL N. MILEIKOWSKY, M.D.,
Respondent.

I. INTRODUCTION

This hearing is hereby terminated because:

A. The intentional acts of misconduct by Dr. Mileikowsky[1] have so prejudiced the hearing it is impossible to complete it consistent with the requirements of fair procedure and due process imposed by California law.

B. Dr. Mileikowsky's repeated acts of misconduct at this hearing have created a situation where he has waived his right to the completion of this hearing and thereby has failed to exhaust his administrative remedies.

Before reviewing and documenting the multiple acts of misconduct by Dr. Mileikowsky, it is important to recognize that the Legislature has mandated that "[p]eer review, fairly

[1] Submissions by Dr. Mileikowsky also implicated his physician advisors, Dr. Wiseman and Spiwak, in improper conduct. See III.A, infra.

conducted is essential to preserving the highest standards of medical practice" and that this is necessary "[t]o protect the health and welfare of the people of California . . . [by excluding] through the peer review mechanism . . . those healing arts practitioners who provide substandard care or who engage in professional misconduct, regardless of the effect of that exclusion on competition." Business and Professions Code section 809 subds. (a)(3), (6). While due process and fair procedure must be provided to the practitioner who stands accused, that practitioner has an obligation to participate in peer review in good faith and to abide by the rules governing peer review. Any failure to do so threatens one of the pillars upon which protection of the public against substandard care rests. To permit a physician to flaunt the peer review process by flagrant violations of rules and procedures governing that process is unacceptable. In my over twenty years of experience in participating in peer review, I have never seen a case with physician misconduct regarding the hearing process which matches this one.

II. *DR. MILEIKOWSKY'S MULTIPLE ACTS OF MISCONDUCT.*

This hearing was requested by Dr. Mileikowsky to contest the summary suspension of his Medical Staff Privileges at Encino Tarzana Regional Medical Center ("ETRMC") by the Medical Executive Committee of the Medical Staff ("MEC"), and to contest the MEC's recommendation not to renew his Medical Staff privileges and to terminate his Medical Staff privileges. The MEC's actions and recommendations are based upon allegations that Dr. Mileikowsky provided substandard medical care in two cases, engaged for nearly ten years in repeated obstruction of peer review of his work, and engaged in abusive behavior towards other members of the Staff.

There was prior hearing on the MEC's proposal not to renew Dr. Mileikowsky's Medical Staff privileges. That hearing resulted in a Hearing Committee decision that Dr. Mileikowsky had defaulted in his defense of the allegations against him due to his refusal to produce relevant documents during the discovery phase of the proceeding. Dr. Mileikowsky appealed that decision to the ETRMC Governing Board where there was a ruling remanding the matter for a new hearing. The present hearing was to provide Dr. Mileikowsky with that rehearing. Nevertheless, Dr. Mileikowsky has chosen to repeat his conduct by refusing to produce relevant evidence in violation of my orders,[2] and has engaged in other misconduct. The sad details of that misconduct are spelled out below and include ex parte contacts with members of the Hearing Committee for the purpose of misleading and prejudicing them, repeated use of personal invective, repeated violations of my rulings, and disruption of hearing sessions.

III. *DR. MILEIKOWSKY'S IMPROPER ACTS WHICH HAVE PREJUDICED THIS HEARING.*

A. *Dr. Mileikowsky's unauthorized ex parte communications with each member of the Hearing Committee regarding the subject matter of the hearing.*

In a letter to me dated 3/20/02, regarding "Method of Delivery of Memorandum and Brief to the JRC", Dr. Mileikowsky admits that on March 18, or 19, 2002, he personally delivered to each member of the Hearing Committee written material regarding the subject matter and the merits of the pending hearing. This included his thirty-five page typewritten brief, a March 15, 2002 one page memorandum from him and his two physician advisors, Dr. Jose Spiwak and Dr. Daniel Wiseman, and a letter to me from Drs. Wiseman and Spiwak falsely dated February 28, 2002. These materials

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[2] See III.D., *infra*.

contain a number of misrepresentations and misleading statements. This direct communication with members of the Hearing Committee was unauthorized and an obvious attempt to prejudice their consideration of the matters before them.

From the vary outset of this proceeding, starting in January, 2001, during voir dire of the members of the Hearing Committee, I repeatedly made it clear that there should be no ex parte communications with members of the Hearing committee regarding the subject matter of the hearing.[3] Dr. Mileikowsky was acutely aware of the prohibition against such ex parte communications. On October 22, 2001, he sent me a letter regarding "My Right to a *FAIR* Hearing and *Violations* of *Rules* of *Conduct* by Dr. *Wulfsberg* and Ms. *Miller*." In that letter, Dr. Mileikowsky alleged that Dr. Wulfsberg and Ms. Debbie Miller had violated "basic rules of conduct" by engaging in ex parte communications with members of the Hearing Committee regarding the subject matter of this proceeding. I dealt with that issue in my November 1, 2001 Ruling on page 1 wherein I reiterated that it was my instruction that the Hearing Committee have no communication "regarding the substance of these proceedings, except in the hearing room." I also stated in my ruling that it was important that "the parties not . . . have communications with members of Hearing Committee regarding the substance of these proceedings, except in the hearing room." Dr. Mileikowsky's awareness of the prohibition on ex parte communications with members of the Hearing Committee is established by his October 22, 2001 letter alleging that such prohibited contacts were occurring. Hence his actions on March 18 or 19, 2002, in personally delivering to each member of the Hearing Committee his brief and other materials regarding the subject matter of this proceeding was

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[3] See, e.g., Transcript of Proceedings, January 30, 2001, at p. 62, lines 5-10; Transcript of Proceedings, June 20, 2001, p. 486, lines 15-25; and Transcript of Proceedings June 20, 2001, p. 564, lines 13-22.

a flagrant and intentional violation of what he himself has characterized in his October 22, 2001 letter as "basic rules of conduct."

Dr. Mileikowsky's typed brief dated March 26, 2002 and captioned "Brief of Gil N. Mileikowsky, M.D., Requested by March 20, 2002 letter of Hearing Officer Daniel Willick" attempts to present a legal justification his ex parte communications. Although the brief contains citations to legal authority, none of the authority cited authorizes or permits ex parte communications with members of a hearing panel or a jury. The only case cited by Dr. Mileikowsky which deals with such communications absolutely repudiates Dr. Mileikowsky's position. *People v. Fitzgerald* (1961) 56 Cal.2d 855, 863. In that case, the court recognized that ex parte communications with a jury regarding a trial which was in progress were improper and prejudicial.[4]

B. *The Ex Parte Communications from Dr. Mileikowsky to the Hearing Committee were Designed to Mislead and to Prejudice the Hearing Committee.*

The materials personally delivered by Dr. Mileikowsky to each member of the Hearing Committee contain a number of misstatements and were designed to mislead to the prejudice.[5] The legal brief and falsely dated February 28, 2002 letter to me from Dr. Wiseman and Dr. Spiwak create the untrue

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[4] None of the other cases cited by Dr. Mileikowsky deal with ex parte communications to a jury or a hearing panel. Those cases cited by Dr. Mileikowsky regarding the principles of estoppel have absolutely no applicability in this matter. See, e.g. *Kolodge v. Boyd* (2001) 88 Cal. App.4th 349. This is because the doctrine of estoppel has no application to the actions of a judge or a hearing officer.

[5] Materials delivered to the Hearing Committee by Dr. Mileikowsky include a thirty-five page typewritten brief, a misdated February 28, 2002 letter to me from Dr. Wiseman and Dr. Spiwak, a memorandum to the Hearing Committee from Dr. Wiseman and Dr. Spiwak dated March 15, 2002 and various items of correspondence.

impression that I would hold hearing sessions after I had ruled that neither Dr. Mileikowsky nor his physician advisors, Dr. Wiseman and Dr. Spiwak, would question witnesses on behalf of Dr. Mileikowsky.

From the very outset of this hearing it was anticipated that Dr. Mileikowsky's physician assistants, that is Dr. Spiwak, and later Dr. Wiseman, would be available to question witnesses. Indeed, on occasion Dr. Spiwak has conducted questioning,[6] and he and Dr. Wiseman have participated in hearings and addressed members of the Hearing Committee. Furthermore, from the very outset of the proceedings both I and the MEC understood that a representative of Dr. Mileikowsky might question witnesses. This is evidenced by the MEC's request that only one person, either Dr. Mileikowsky or his physician representative, should be permitt3ed to question each witness on his behalf and by my ruling granting that request.[7] Accordingly, when Dr. Mileikowsky's disruptions of the hearing, which are describe below, went well past what was permissible, I ruled that questioning on behalf of Dr. Mileikowsky would proceed with appropriate safeguards and be carried out by Dr. Wiseman or Dr. Spiwak. This was first stated in my January 3, 2002 Ruling. Indeed, on January 4, 2002, Dr. Mileikowsky sent me a letter proposing limited questioning by his advisors.[8] It was not until over two months later on or about March 15, 2002, when I first received the falsely dated February 28, 2002 letter to me from Dr. Wiseman and Dr. Spiwak, that I was informed that Drs. Wiseman and Spiwak were refusing to question witnesses on behalf of Dr. Mileikowsky. I promptly

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[6] See June 20, 2001 Transcript at p. 519, lines 5-1-, p. 552, line 18 to p. 553, line 11.

[7] See, Dr. Wulfsberg's June 29, 2001 letter to me and my July 11, 2001 Ruling at page 2, lines 15-22.

[8] In Dr. Mileikowsky's January 4, 2002 letter to me at pp. 6-7, he offered to have Dr. Spiwak or Dr. Wiseman question a witness for him.

cancelled the March 20, 2002 hearing session, because there would be no one to question witnesses on behalf of Dr. Mileikowsky and because, as stated in my March 19, 2002 letter to Dr. Mileikowsky and Dr.Wulfsberg, "Dr. Mileikowsky is unable to proceed in compliance" with my ruling that questioning occur through his assistants Dr. Wiseman and Dr. Spiwak.

Dr. Mileikowsky's ex parte communications to the Hearing Communication, by enclosing the misdated February 28, 2002 letter to me from Dr. Wiseman and Dr. Spiwak, created the false impression that I was proposing to have the hearing proceed without anyone being available to ask questions on behalf of Dr. Mileikowsky.[9]

There is evidence that Dr. Mileikowsky's ex parte communications to the Hearing Committee created prejudice. At least one Hearing Committee Member is reported to have been outrage by my purported refusal to allow any representative of Dr. Mileikowsky to question witnesses.[10]

There were other misleading statements in the materials delivered by Dr. Mileikowsky to the Hearing Committee. For example:

> 1. Dr. Mileikowsky contends in his March 15, 2002 brief at pages 10-11, that he has been denied his right to advice by an attorney. This is absolutely false. During the course of these proceedings, Dr.

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[9] It is significant to note that Dr. Mileikowsky in a March 19, 2002 letter to me (captioned "1. Dr. Wiseman and Spiwak's letter of 2/28/02. 2. Our Response Memorandum of 3/15/02") goes to elaborate lengths to try to explain the misdating of the February 28, 2002 letter to me fro Dr. Wiseman and Dr. Spiwak which was not received by me until March 15, 2002.

[10] See, the March 19, 2002 letter to me from Ms. Ana Sudas which reports that one member of the Hearing Committee, Dr. Pleet, was outraged.

Mileikowsky has been represented by no less than four attorneys or law firms – Mirch & Mirch; Arthur Chenen of Stephan, Oringher, Richman & Theodora; Paul Hittelman; and Ethan Schulman of Howard, Rice Nemerovski, Canady, Falk & Rabkin. In fact, at the request of Dr. Mileikowsky, I have extended deadlines so his attorneys could prepare briefs and have sent various rulings to his attorneys.

2. Dr. Mileikowsky contends in his March 15, 2002 brief that he has been deprived of the right to make a record of his disagreements with my rulings. This is false. The record is replete with his hundreds of letters disagreeing with my rulings.

Dr. Mileikowsky's ex parte communications to the Hearing Committee also take advantage of my insulation of the Hearing Committee from his conduct which could prejudice their opinion of him and seek to create the false impression that he is innocent of disrupting these proceedings. In fact, I have insulated the Hearing Committee from Dr. Mileikowsky's repeated attacks regarding their fairness and qualifications.[11] I have also insulated them from much of Dr. Mileikowsky's personal invective directed towards me, the MEC representative, MEC witnesses and hospital administrators.

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[11] See, e.g. June 20, 2001 Transcript, p. 519, line 15 to p. 521, line 8. See Dr. Mileikowsky's 8/25/01 letter to me "Re: Present Kangaroo Court" in which at p. 3 he accuses four members of the present Hearing Committee of being a "Kangaroo Court."

C. *Dr. Mileikowsky Violated My Order that He Make No Reference to His Lawsuits Against Approximately Twenty Defendants, Including Many Physicians and Various Tenet Healthcare Entities.*

Early in these proceedings, Dr. Mileikowsky sought to present to the Hearing Committee copies of voluminous pleadings which he filed in two lawsuits against many physicians and various Tenet Healthcare entities. Although the lawsuits deal with many of the issues which are presented in the pending Medical Staff Hearing there are no final orders adjudicating any of the issues before the Hearing Committee. Also, I was concerned that that it would prejudice the Hearing Committee to see that Dr. Mileikowsky had sued so many physicians in the lawsuits and that it would potentially confuse the Hearing Committee to be inundated with pleadings from the lawsuits which have not resulted in final rulings on any of the issues presented in the Medical Staff hearing. Since I wished to have the Hearing Committee use its own judgment without reference to inconclusive legal proceedings, I ruled that the lawsuits should not be referenced in this Medical Staff hearing. (March 14, 2001 Ruling at p. 5, line 20 to p. 6, line 6.) Also, in my July 11, 2001 Ruling at pages 1-2, I ruled that all filings in Dr. Mileikowsky's lawsuits, except for sworn statements relevant to the allegations in this Medical Staff hearing, would not be admitted as exhibits in this hearing.

Although these rulings regarding Dr. Mileikowsky's lawsuits were intended to protect Dr. Mileikowsky from prejudice and confusion, he violated my rulings by continuously making reference to his lawsuits in front of the Hearing Committee and by misrepresenting the rulings in his lawsuits. The details of Dr. Mileikowsky's violations of my order regarding references to his lawsuits and of his efforts to mislead the Hearing Committee regarding the lawsuits are documented in my September 13, 2001 Ruling at pages 1-2.

C. *Dr. Mileikowsky's Violation Of My Orders Regarding Discovery.*

California law, Business and Professions Code section 809.2 subd. (c) requires that the MEC has the right to review and copy any documentary evidence in the possession of Dr. Mileikowsky which is relevant to its charges against him. This right is also guaranteed by the Medical Staff Bylaws at Article VIII, Section 3.G. Nevertheless, despite my repeated rulings, Dr. Mileikowsky has refused to provide documents directly bearing upon the charges against him for review by the MEC. See, for example, my June 11, 2001 Ruling at pages 2-4 and my July 11, 2001 Ruling at pages 2-3. Those rulings document in detail Dr. Mileikowsky's refusals to produce documents which I have ordered him to produce for review by the MEC. For example, Dr. Mileikowsky refused to produce documents directly relating to the decision of the Governing Board of Cedars Sinai Medical Center to suspend and terminate his Medical Staff privileges for deficiencies in care. (The MEC alleges at Charge No. 27 that Dr. Mileikowsky violated his peer review obligation at ETRMC to produce information about the discipline against him at6 Cedars Sinai.) Dr. Mileikowsky has also refused to produce documents relevant to allegations that he was repeatedly unavailable for peer review of his treatment of patients. The MEC requested and pursuant to my orders was entitled to review original copies of Dr. Mileikowsky's calendars and appointment books regarding his activities on dates when he disrupted or avoided appearing at peer review investigations. Dr. Mileikowsky has violated my orders and refused to allow the MEC access to the documents in question.

E. *Dr. Mileikowsky's Violation of My Ruling Regarding His Obligation to Provide His Proposed Exhibits and an Exhibit List.*

California law, Business and Professions Code section 809.2 subd. (f) requires that Dr. Mileikowsky "produce copies of documents expected to be introduced at the hearing" and that this occur at least ten days before the commencement of the hearing. Failure to meet this requirement is good cause to postpone the hearing. There is a similar requirement in the Medical Staff Bylaws at Article VIII, Sections 3H and 3I.

Dr. Mileikowsky has failed to produce in a timely manner his exhibit list or his proposed exhibits. See, for example, my July 11, 2001 Ruling at page 2, lines 6-14 and my September 5, 2001 Ruling at pages 2-3. Since July 11, 2001, I have repeatedly requested that Dr. Mileikowsky submit an appropriate exhibit list and copies of his proposed exhibits in compliance with my July 11, 2001 Ruling. He has consistently failed to do so. This violation of California Law and the Medical Staff Bylaws, standing alone justifies a suspension of this hearing. Notwithstanding these failures by Dr. Mileikowsky to produce his proposed exhibits and his proposed exhibit list, he has disrupted hearing sessions by pulling out surprised documents which he wishes to use as exhibits, and then acting as if he is aggrieved by my insistence on compliance with the Medical Staff Bylaws and California Law. (On January 28, 2002, Dr. Mileikowsky finally submitted a proposed exhibit list without copies of any proposed exhibits.)

F. *Dr. Mileikowsky's Violation of My Order to Submit a Brief Concerning Allegations That He Failed to Cooperate in Peer Review.*

Many of the MEC's allegations against Dr. Mileikowsky, such Charge Numbers 1 through 19 and 27, concern Dr.

Mileikowsky's alleged failure to cooperate in peer review. These charges do not allege that his underlying care of patients in the matters under review was deficient. Rather they allege that there were grounds to conduct peer review of his underlying care and that he repeatedly failed to cooperate in peer review and disrupted the peer review process. Because of the extensive nature of these charges, my June 11, 2001 Ruling at page 7, lines 12-17, ordered that "[a]s to each allegation that Dr. Mileikowsky failed to cooperate in peer review involving patient care where there is no present charge that Dr. Mileikowsky provided deficient patient care, I will permit each party to submit in writing a brief statement of no longer than one paragraph concerning the subject of peer review in question and attaching documents form the medical record regarding the matter subject to peer review." These written statements were to be submitted at least one week before the evidentiary hearings with the Hearing Committee commenced. My ruling went on to state that, unless the Hearing Committee wished otherwise, there would be no other presentation regarding the underlying patient care. The purpose of my ruling was to expedite this hearing and not to bog it down in questions regarding underlying patient care where there was no present contention of deficient care. Dr. Mileikowsky never complied with this ruling. He never submitted the required written statement.

G. *Dr. Mileikowsky's Repeated Disruption of Hearing Sessions.*

Dr. Mileikowsky has disrupted hearing sessions by yelling, by disobeying my rulings regarding the questioning of witnesses, and by misrepresenting whether he received documents which are the subject of a particular hearing. For example, my September 13, 2001 Ruling documents that at the September 5, 2001 hearing, Dr. Mileikowsky disrupted the proceedings because he disagreed with my prohibition of his reference to his litigations in front of the Hearing

Committee. My December 26, 2001 Ruling at pages 3-4 and the Transcript of the November 29, 2001 hearing document that Dr. Mileikowsky disrupted the November 29, 2001 hearing, by falsely contending that he had not received a Novemoer 19, 2001 letter from Dr. Wulfsberg enclosing exhibits. Examples of Dr. Mileikowsky's disorderly conduct and disruption of hearings are found in the transcripts of the hearings on September 5, 2001, November 29, 2001, and December 17, 2001.

H. *Dr. Mileikowsky's Repeated Use of Personal Invective and Threatening Language.*

Throughout these hearings, Dr. Mileikowsky has engaged in written and oral statements which abuse witnesses, the MEC's representatives, hospital administrators, and me. For example, at the December 17, 2001 hearing despite my efforts to retrain him, Dr. Mileikowsky heaped verbal abuse on the witness Dr. Ben Yehuda. He called Dr. Ben Yehuda "superficial and careless" (December 17, 2001 Transcript, p. 2003, lines 10-11), stated to the witness "you don't have the knowledge" (*id.* p. 2005, lines 22-23), and stated that the witness has an "interest to see that my practice goes down the tube" (*Id.*, p. 2007, line 25 0 p. 2008, line 1). Dr. Mileikowsky in his January 11, 2002 letter to me accuses Mr. Auer, an attorney for the MEC, of "fabrications". In his January 3, 2002 letter to me, he states "Clearly you are oblivious to the danger to your own life if an armed guard shoots in the wrong direction and kills you." A letter from Dr. Mileikowsky which states it was sent at 5:00 a.m. on January 4, 2002, states at page 2 that I "still *LIE* by *omission*" and at page 3 states that I "Suffer from the Same Delusions as Mr. Auer." In the same letter at page 5, Dr. Mileikowsky states to me he fails "to understand the logic behind your madness." The record is replete with other instances of personal invective being used by Dr. Mileikowsky.

I. *Dr. Mileikowsky's Insistence that He May Disobey my Orders Regarding the Conduct of this Hearing.*

After the December 17, 2001 hearing session, the evidentiary portion of this hearing was suspended. This was after repeated disruptions of hearing sessions and a continuing series of refusals by Dr. Mileikowsky to abide by the rules governing these proceedings. These disruptions and refusals are detailed above. In my January 3, 2002, January 14, 2002 and February 19, 2002 Rulings, I set ground rules for the continuation of this hearing and stated that the hearings would not continue until Dr. Mileikowsky agreed in writing to abide by my rulings. (Copies of these rulings are attached as Exhibits 1, 2 and 3 respectively.) They document Dr. Mileikowsky's responses to my rulings with a series of letters vowing his defiance and stating he would interfere with instructions I was going to give to the Hearing Committee. He also sought to contend that he could not comply with my rulings because there were many pending unresolved issues. I dealt with these contentions in my February 28, 2002 Ruling, which is attached as Exhibit 4.

In light of Dr. Mileikowsky's continuing refusals to obey my rulings for the conduct of this hearing, in my March 1, 2002 Ruling I requested briefing on the issues of whether Dr. Mileikowsky had abandoned his defense due to his failures to comply with the rules and rulings for this hearing, and whether I could suspend the hearing and report to the ETRMC Board of Directors that the suspension was due to Dr. Mileikowsky's abandonment of his defense and failure to exhaust his administrative remedies. I also requested briefs suggesting an alternative procedure which might be used to complete the hearing. Subsequently, Dr. Mileikowsky punctuated his refusals to obey my rulings by initiating his ex parte communications with the members of the Hearing Committee on the merits of this hearing as described above in Sections III.A. and III.B.

IV. *CONCLUSION.*

California Business and Professions Code section 809.2, subd. (d) authorizes me to "impose any safeguards the protection of the peer review process and justice requires." The Medical Staff Bylaws at Article VIII, Section 4B authorize me to "maintain decorum and assure that all participants in the hearing have a reasonable opportunity to present oral and documentary evidence." Article VIII, Section 4A of the Medical Staff Bylaws authorizes me to rule that a practitioner "who fails without good cause to appear and proceed" at the hearing "shall be deemed to have waived his/her rights . . . ." I rely upon these provisions to rule that this hearing is terminated because:

A. The intentional acts of misconduct by Dr. Mileikowsky have so prejudiced the hearing that it is impossible to complete it consistent with the requirements of fair procedure and due process imposed by California law.

B. Dr. Mileikowsky's repeated acts of misconduct at this hearing have created a situation where he has waived his right to the completion of this hearing and thereby has failed to exhaust his administrative remedies.

DATED: March 30, 2002

/s/ Daniel H. Willick
DANIEL H. WILLICK
Hearing Officer

APPENDIX H

Cal Bus & Prof Code § 809.3 (2005)

§ 809.3. Rights during hearing concerning final proposed action; Burden of presentation and proof; Representation by attorney

(a) During a hearing concerning a final proposed action for which reporting is required to be filed under Section 805, both parties shall have all of the following rights:

(1) To be provided with al of the information made available to the trier of fact.

(2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the preparation thereof.

(3) To call, examine, and cross-examine witnesses.

(4) To present and rebut evidence determined by the arbitrator or presiding officer to be relevant.

(5) To submit a written statement at the close of the hearing.

(b) The burden of presenting evidence and proof during the hearing shall be as follows:

(1) The peer review body shall have the initial duty to present evidence which supports the charge or recommended action.

(2) Initial applicants shall bear the burden of persuading the trier of fact by a preponderance of the evidence of their qualifications by producing information which allows for adequate evaluation and resolution of reasonable doubts concerning their current qualifications for staff privileges, membership, or employment. Initial applicants shall not be permitted to introduce information

not produced upon request of the peer review body during the application process, unless the initial applicant establishes that the information could not have been produced previously in the exercise of reasonable diligence.

(3) Except as provided above for initial applicants, the peer review body shall bear the burden of persuading the trier of fact by a preponderance of the evidence that the action or recommendation is reasonable and warranted.

(c) The peer review body shall adopt written provisions governing whether a licentiate shall have the option of being represented by an attorney at the licentiate's expense. No peer review body shall be represented by an attorney if the licentiate is not so represented, except dental professional society peer review bodies may be represented by an attorney provided that the peer review body grants each licentiate the option of being represented by an attorney at the licentiate's expense, even if the licentiate declines to be represented by an attorney.

APPENDIX I

42 USCS § 11112

§ 11112. Standards for professional review actions

(a) In general. For purposes of the protection set forth in section 411(a), a professional review action must be taken—

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3). A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 411(a) unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing. A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action. The physician has been given notice stating—

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 days) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing. If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating—

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice. If a hearing is requested on a timely basis under paragraph (1)(b)—

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right—

(i) to representation by an attorney or other person of the physician's choice,

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right—

(i) to receive the written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3).

(c) Adequate procedures in investigations or health emergencies. For purposes of section 411(a), nothing in this section shall be construed as—

(1) requiring the procedures referred to in subsection (a)(3)—

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14

days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

APPENDIX J

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO

[Filed Dec. 21, 2004]

Case No. 04CS00969

GIL NATHAN MILEIKOWSKY, M.D.
Petitioner,

v.

MEDICAL BOARD OF CALIFORNIA,
Respondent.

Judge: Hon. Raymond M. Cadei

JUDGMENT GRANTING PEREMPTORY
WRIT OF ADMINISTRATIVE MANDAMUS

The court having read and considered the verified Petition for Writ of Administrative Mandamus, the motions for peremptory writ of administrative mandamus, the opposition, the reply, and the administrative record, the Court having issued a tentative decision and neither party having requested oral argument, and GOOD CAUSE APPEARING.

IT HEREBY ORDERED, ADJUDGED, AND DECREED that a peremptory writ of administrative mandamus issue under the seal of this Court directing Respondent Medical Board of California to vacate its order of November 12, 2002 compelling Petitioner to submit to a mental and physical examination, and to vacate its order of July 16, 2004, which had adopted a proposed decision submitted on June 24, 2004 by the Administrative Law Judge.

This judgment is based upon the Court's Minute Order filed December 10, 2004.

Petitioner shall recover his costs in the sum of $___ against Respondent Medical Board of California.

/s/ Hon. Raymond M. Cadei
Hon. Raymond M. Cadei
Judge

It is further ordered that this Judgment does not preclude Respondent from taking further action on the basis of the "805 report", as opposed to the orders that have been vacated by this ruling, provided that such action is taken in conformity with the views expressed herein regarding full consideration of all relevant factors and available evidence, and the use of a disinterested medical reviewer.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME: 12/21/04 nunc pro tunc December 10, 2004
JUDGE: Raymond M. Cadei
REPORTER: none
DEPT. NO: 23
CLERK: Cindy Jo Miller
BAILIFF: Michelle Luther
CASE NO.: 04CS00969

GIL N. MILEIKOWSKY, M.D.—RET, Petitioner,
VS.
MEDICAL BOARD OF CALIFORNIA—[illegible]ES, Respondent.

PRESENT: Roger Diamond, Esq. & Paul Hittleman, Esq.
Robert C. Miller, Deputy Attorney General
David B. Parker, Esq. for Applicant and Proposed *Amicus Curiae*—Assoc. of American Physicians & Surgeons, Inc.

Nature of Proceedings: AMENDED MINUTE ORDER
HEARING RE: PETITION FOR WRIT OF MANDAMUS

The above-entitled cause came on for hearing this day for which the court issued a tentative ruling the previous day. The court affirmed its tentative ruling in that neither party requested hearing to argue the tentative ruling.

MILEIKOWSKY v. MEDICAL BOARD OF CALIFORNIA, Case No. 04 CS 00969;

The following shall constitute the Court's tentative ruling on the petition for writ of mandate, set for hearing on Friday, December 10, 2004. The tentative ruling shall become the ruling of the Court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

The petition for writ of mandate is granted.

An order for examination under Business and Professions Code section 820 is an investigatory procedure that does not require the full range of procedural due process protections that are available to a licensee in an adjudicatory procedure. (*See, Alexander D. v. Board of Dental Examiners* (1991) 231 Cal. App. 3d 92.)

Nevertheless, such an order does require a showing of good cause, and where no such showing has been made the licensee's privacy rights have been violated, the order is not valid, and the licensee cannot be disciplined under Business and Professions Code section 821 for failing to obey it. (*See, Kees v. Medical Board* (1992) 7 Cal. 4th 1801.)

In this case, the Court finds that, as the result of various irregularities in the process that resulted in the order that petitioner submit to a mental examination, no showing of good cause was made, or, in fact, could be made under the procedure followed in this case. Those irregularities may be summarized as follows.

The "805 report" on which the order was based does not, by itself, inevitably lead to the conclusion that petitioner suffers from mental or physical illness that renders him unable to practice medicine safely within the meaning of Business and Professions Code section 820. The incidents described in the report do not appear to fit into a neat pattern, and not all of them truly suggest bizarre or unbalanced behavior. Some of the incidents described in the report, in fact, are equivocal in nature and might just as accurately be characterized as incidents of aggressive or unpleasant behavior by petitioner in the context of a confrontation, rather than as evidence of mental illness or impairment. Some of the incidents listed in the report, such as that petitioner was required to be monitored by security personnel while on hospital premises, or that a representative of the nurses' union complained that nurses felt threatened by petitioner, are presented without any specific

factual context, are based on hearsay, and (as above) may reflect a confrontational personality rather than mental illness or impairment Finally, two of the incidents were at least a year old at the time of the report, and all of them were more than two years old at the time of the order. The age of the incidents raises questions about their relevance to determining petitioner's condition at the time of the order.

Petitioner contends that many of the incidents recounted in the report may indeed by explained as arising out of a dispute between himself and the hospital management. Respondent permitted petitioner to submit documentation explaining his side of the matter, but the record indicates that respondent did not forward those materials to the assigned medical reviewer for consideration. Moreover, it does not appear that petitioner's materials were considered in respondent's investigation report, although there is evidence that they had been forwarded to the assigned investigator approximately seven months prior to the date of the report. Similarly, there is no indication in the final order for examination that petitioner's materials were considered by anyone on behalf of respondent.

Finally, and perhaps most significantly, the record shows that the assigned medical reviewer, Dr. Noble, was associated with the institution that had made the "805 report", and that respondent knew of that association at the time he was appointed to review petitioner's case. Such association suggests, at a minimum, the possibility of a conflict of interest that might taint Dr. Noble's ultimate conclusions. As noted, Dr. Noble did not receive the material petitioner submitted to explain his actions. His declaration in support of the petition to compel the examination of petitioner largely mirrors the content of the "805 report", with, however, at least one additional allegation (regarding petitioner taking up to 150 photographs after a hysterectomy) that does not appear in the "805 report", the source of which has never been adequately explained.

In any case, Dr. Noble's declaration, which appears to have been the only expert medical opinion in support of the order, does not address the age of the allegations against petitioner or the explanatory factual context in which they arose. Whether this was the reflection of a conflict of interest or of a simple failure to have available and consider all of the relevant facts, the result is that Dr. Noble's declaration fails to establish good cause to order petitioner to submit to an examination.

Based on the foregoing, the Court finds that there was no showing of good cause to support the order that petitioner submit to an examination under Business and Professions Code section 820. Under the principles stated in *Kees v. Medical Board, supra*, 7 Cal. App. 4th at 1815, as a matter of law the finding that petitioner violated section 820 cannot stand. The petition for writ of mandate accordingly is granted to require respondent to vacate the disciplinary order entered against petitioner dated July 16, 2004 as well as the underlying order for examination dated November 12, 2002. The stay previously entered by the Court shall be continued in effect until respondent has complied with the writ. The Court's ruling does not preclude respondent from taking further action on the basis of the "805 report", as opposed to the orders that have been vacated by this ruling, provided that such action is taken in conformity with the views expressed herein regarding full consideration of all relevant factors and available evidence, and the use of a disinterested medical reviewer.

In the event that this tentative ruling becomes the final ruling of the Court, counsel for petitioner is directed to prepare a written order, judgment and writ of mandate in conformity with this ruling, submit them to counsel for respondent for approval as to form, and thereafter submit them to the Court pursuant to Rule of Court 391.

BY: /s/ CINDY JO MILLER
Cindy Jo Miller
Deputy Clerk

APPENDIX K

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

[Filed Jun. 6, 2005]

2nd Civ. B168705
(Los Angeles County Superior Court No. BS079131)

GIL N. MILEIKOWSKY, M.D.
Plaintiff and Appellant,

vs.

TENET HEALTHSYSTEM, *et al.*,
Defendants and Respondents.

APPEAL FROM THE SUPERIOR COURT OF
LOS ANGELES COUNTY
(HONORABLE DAVID P. YAFFE, JUDGE)

NOTICE OF LODGING AND REQUEST TO TAKE JUDICIAL NOTICE OF SIX *AMICUS CURIAE* BRIEFS FILED IN SUPPORT OF GIL N. MILEIKOWSKY

ROGER JON DIAMOND
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(310) 392-9029-Fax
State Bar No. 40146

Attorney for Plaintiff & Appellant

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

2nd Civ. B168705
(Los Angeles County Superior Court No. BS079131)

GIL N. MILEIKOWSKY, M.D.
Plaintiff and Appellant,

vs.

TENET HEALTHSYSTEM, *et al.*,
Defendants and Respondents.

NOTICE OF LODGING AND REQUEST TO TAKE JUDICIAL NOTICE OF SIX *AMICUS CURIAE* BRIEFS FILED IN SUPPORT OF GIL N. MILEIKOWSKY

TO THE HONORABLE JUSTICES OF THE SUPREME COURT AND TO RESPONDENT TENT HEALTHSYSTEM AND ITS ATTORNEYS, CHRISTIANSEN AND AUER:

Petitioner Gil N. Mileikowsky, M.D. hereby lodges with the clerk 10 copies of *amicus curiae* briefs filed by various *amicus curiae* in support of Petitioner in the Court of Appeal in the instant case, 2nd Civ. B168705 and in the related earlier writ proceeding, *Mileikowsky v. Superior Court*, 2nd Civil No. B150337.

The briefs in 2nd Civil B150337 are part of the administrative record in the instant case and are also part of the record in *Mileikowsky v. Tenet Healthsystem*, 128 Cal. App. 4th 262 (2005), Petition for Review filed May 13, 2005 (Supreme Court No. S133894), a case which is related to the instant case.

Petitioner requests this Court to take judicial notice of these 6 *amicus* briefs pursuant to Evidence Code Section 459. They demonstrate that review is necessary to settle important questions of law under Rule 28(b)(1). These 6 briefs are already part of the record. Petitioner is providing these briefs as extra copies for this Court's convenience because the other copies may be difficult to locate in the voluminous record.

Respectfully submitted,

/s/ Roger Jon Diamond
ROGER JON DIAMOND
Attorney for Plaintiff & Appellant

COURTESY COPIES OF SIX *AMICUS CURIAE* BRIEFS

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NUMBER	DESCRIPTION
1	*Amici Curiae* Brief of the California Medical Association and The American Medical Association In Support of Petitioner
2	Application of California Academy of Attorneys For Health Care Professionals For Leave To File *Amicus Curiae* Letter Brief In Support of Petition
3	*Amicus* Brief of Union of American Physicians and Dentists In Support of Petitioner
4	Brief *Amicus Curiae* of Union of American Physicians and Dentists in Support of Appellant
5	*Amicus* Brief of the Consumer Attorneys of California In Support of Petitioner and Appellant
6	Application For Leave to File *Amicus Curiae* Brief In Support of Gil N. Mileikowsky by the Association of American Physicians & Surgeons, Inc. and Memorandum of *Amicus Curiae* of the Association of American Physicians & Surgeons, Inc., In Support of Petitioner-Appellant Gil N. Mileikowsky, M.D.

APPENDIX L

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF OS ANGELES, NORTHWEST DISTRICT

[Filed June 28, 2000]

CASE NO. LC 046 932

DONNA HEAD and RICHARD HEAD,
Plaintiffs,

v.

MICHAEL VERMESH, M.D., individually and d.b.a. Center for Human Reproduction and d.b.a. The Center for Fertility and Gynecology' SNUNIT BEN-OZER, M.D.; AMI/HTI TARZANA ENCINO, a business entity, form unknown, d.b.a. Encino/Tarzana Regional Medical Center; WEST COAST CLINICAL LABORATORIES, L.P., a limited partnership; and DOES 1 through 50, Inclusive,
Defendants.

DECLARATION OF GIL N. MILEIKOWSKY, M.D.
IN SUPPORT OF PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION
FOR SUMMARY ADJUDICATION

DATE:	July 12, 2000
TIME:	9:00 a.m.
DEPT:	Z
Complaint Filed:	December 30, 1998
Discovery Cutoff:	July 7, 2000
Motion Curoff:	July 21, 2000
Trial Date:	August 7, 2000

I, Gil N. Mileikowsky, M.D., declare as follows:

1. I have personal knowledge of the facts stated in this declaration, except as otherwise stated, and if called upon to do so I could and would competently testify thereto.

2. A summary of my qualifications to render an opinion in this matter is as follows: I am certified by the Board of Obstetrics & Gynecology in the United States and Belgium, and am licensed to practice medicine in California, Texas and Belgium. I obtained a medical degree, Cum Laude, from the Catholic University of Louvain, Belgium in 1979. I then completed four year of residency at the Department of Obstetrics & Gynecology at Baylor College of Medicine and a two-year fellowship at LAC?USC Medical Center, Women's Hospital Clinical Research Fellow Reproductive Endocrinology and infertility, including in-vitro fertilization. I was a Clinical Instructor in Obstetrics and Gynecology at USC School of Medicine from 1984 through 1987. Thereafter, I was Chairman of the Laser and Safety Committee of Northridge Hospital from 1987 through 1988. I was Medical Director of the In-Vitro Fertilization Program at Northridge Medical Center from 1988 to 1994 and and Assistant Clinical Professor at UCLA from 1994 until 1998. I have just recently been accepted as a life member of the National Registry of Who's Who in medicine. I also continue to see private patients and have been on staff at Tarzana Regional Medical Center (formerly known as AMI) since 1986. A true and correct copy of my current curriculum vitae, which outlines my experience and expertise in further detail, is attahed hereto as *Exhibit A*.

3. Based upon my education, training and experience, I am familiar with the standards of care applicable to medical practioners in the community who specialize in obstetrics, gynecology, and infertility and am qualified to render a opinion regarding the treatment of Donna Head at the hands of Drs. Michael Vermesh and Snunit Ben-Ozer.

4. I have reviewed the following in order to prepare this declaration:

a. medical records of Donna Head, including, but not limited to, the following:

i. the hospital consent form for Ms. Head's November 12, 1997 surgery;

ii. the "Informed Consent" form signed by Dr. Ben-Ozer prior to Ms. Head's November 12, 1997 surgery;

iii. the operative report of Ms. Head's November 12, 1997 surgery prepared by Dr. Be-Ozer;

iv. the Consent Form for Procedures Involved in In Vitro Fertilization and Prre-Embryo Replacement from the Center for Reproductive Medicine signed by Donna Head and her husband;

v. the laboratory report from San Fernando Valley Institute for Reproductive Medicine regarding Ms. Head's embryo transfer procedure and the handling of her eggs;

vi. the complete records provided by Dr. Michael Vermesh relating to Donna Head;

vii. the complete records provided by Dr. Snunit Ben-Ozer relating to Donna Head;

viii. the complete records provided by Encino-Tarzana Medical Center relating to Donna Head;

ix. the complete records provided by Dr. Karrie McMurray relating to Donna Head;

b. deposition testimony of Dr. Michael Vermesh;

c. deposition testimony of Dr. Snunit Ben-Ozer;

d. deposition testimony of Dr. Alan Bricklin;

e. deposition testimony of Donna Head; and

f. the moving papers served by Drs. Vermesh and Ben-Ozer and the Center for Human Reproduction in support of their motion for summary adjudication.

5. Based upon my education, training, and experience, and upon my review of the foregoing materials, it is my opinion that the actions admittedly taken by Drs. Vermesh and Ben-Ozer in failing to obtain Donna Head's informed consent to remove her Fallopian tubes fell far bellow the standard of care. There is no support in the doctor's deposition testimony or records for their contention that they obtained Ms. Head's permission to perform this procedure at all, let alone met the applicable standard of case for obtaining the patient's informed consent.

6. It is the obligation of the surgeon and the hospital nursing staff to obtain a patient's informed consent for any surgical procedure. Additionally, the standard of care in the United States, including this community, for any surgery dictates that the surgeon must obtain a patient's *written* consent where it is possible to do so (i.e., if the patient is unconscious, consent should be obtained from the family).

7. In this case there was ample time to obtain Ms. Head's written consent. Dr. Ben-Ozer met with Ms. Head the morning of the surgery to discuss the possibility that Ms. Head had an ectopic pregnancy. (This meeting is reflected in Dr. Ben-Ozer's patient notes, Ben-Ozer Depo., Exh. G.) Further, there was clearly time for a hospital consent form to be filled out, as evidenced by the wholly inadequate form signed by Ms. Head. However, Ms. Head's written consent for removal of her Fallopian tubes was not obtained. There are only two consent forms in Ms. Head's records provided by Drs. Vermesh and Ben-Ozer and by the hospital. (Copies of these forms are arrached hereto as *Exhibits B* and *C* for ease of reference.) The consent form signed by Dr. Ben-Ozer (Exh. B) indicates that the patient has given consent for the "noted procedure(s)." However, no procedures are noted on

the form. The hospital consent form (Exh. C) indicated that the procedure to be performed is "ectopic pregnancy, laparoscopy." The notation "Eectopic pregnancy" is a diagnosis, not a procedure. It indicated that the patient is either suspected or known to have an ectopic pregnancy. The only procedure listed on Ms. Head's form is a laparoscopy. As Dr. Ben-Ozer admits, a laparoscopy is merely a viewing procedure and does not involve the removal or dissection of any body parts. (Ben-Ozer Depo., 37:11-16.) To say that these two written forms are grossly insufficient if they are being championed as consent for a bilateral salpingectomy (removal of both Fallopian tubes) is an understatement.

8. Additionally, California law requires that physicians obtain their patients' written consent prior to performing elective, i.e. non-emergency, sterilization procedures. The patient must sign a Health and Welfare Agency ("HWA") consent form. (A true and correct copy of this form is attached hereto as *Exhibit D.*) The consent form must be used before doctors perform even less drastic procedures than the tubal removal performed on Ms. Head, such as tubal ligations (tying the Fallopian tubes to prevent future pregnancies). There was no emergency requiring the removal of Ms. Head's Fallopian tubes and her consent on this form should have been obtained. However, even if Ms. Head's ectopic pregnancy could be deemed an emergency satiation, the 1997 California Healthcare Association Consent Manual makes clear that if the emergency does not mandate a procedure that could result in sterilization, the HWA form must be used. Included in the definition of an elective sterilization is a "sterilization that is performed at the same time as emergency abdominal surgery or premature or early delivery, but is not a necessary incident to the emergency abdominal surgery or premature or early delivery." (CHA Consent Manual, 24th Edition, 1997, p. 3-10.)

9. Setting aside for a moment that the doctors' failure to obtain the patient's *written* consent in and of itself falls below the standard of medical care, the doctors' allegation that they obtained Ms. Head's *oral* consent are not supported by wither the records or testimony in this case.

a. First, Ms. Head testified at her deposition that she never gave consent to the removal of either of her Fallopian tubes. The procedure explained to her was that the doctors would look with the laparoscope to determine if she had an ectopic pregnancy and, if so, that the pregnancy would have to be removed. (Head Depo., 40:16-41:14.) She was never told that the Fallopian tube the ectopic pregnancy was in would have to be removed and she was certainly nevertold by either doctor that the uninvolved Fallopian tube would be examined at all, let alone removed. (Head Depo. 41:15-22.)

b. Second, Dr. Vermesh admitted he had no memory of obtaining Ms. Head's consent to remove her Fallopian tubes. (Vermesh Depo., 16:23-17:4, 20:4-6, 20:19-23, and 31:3-5.)

c. Third, Dr. Ben-Ozer admitted twice during her deposition that she had no memory of obtaining Ms. Head's consent to remove her Fallopian tubes. When asked at her deposition if she obtained Ms. Head's consent, Dr. Ben-Ozer responded, "Yes, I did, if necessary." (Ben-Ozer Depo., 25:9-11.) She then expanded upon the purported consent discussion by saying that she discussed "that a *possible* treatment for the ectopic pregnancy *may* 'require' a salpingostomy or salpingectomy or *perhaps* a salpingo hysterectomy." (Ben-Ozer Depo., 25:12-26:9, internal quotes added.) After again contending that she obtained Ms. Head's consent for the bilateral tube removal, (yet providing no *details* of the consent supposedly given), Dr. Ben-Ozer made a very telling admission. She testified, not once but twice, that she had no memories of *any* consent discussions with Ms. Head. (Ben-Ozer Depo., 26:10-27:20.)

d. Finally, Ms. Head's medical records contain absolutely no evidence that the doctors obtained her consent to remove her Fallopian tubes. I have reviewed Dr. Ben-Ozer's November 12, 1997 patient notes which she asserts reflects her discussion about treatment for Ms. Head's possible ectopic pregnancy. I see nothing in these notes that reflects an iral consent from Ms. Head's for the removal of her Fallopian tubes. The only note that directly related to Ms. Head's November 12, 1997 surgery states: "plan – re[eat HCG = > if ↑ ing consider L/S, D&C." (This meeting is reflected in Dr. Ben-Ozer's patient notes, Ben-Ozer Depo. Exh. G.) Dr. Ben-Ozer's notes merely suggest that she may have had a discussion with Ms. Head regarding a possible laparoscopy and D&C. Again, a laparoscopy is simply a viewing procedure. A D&C is a removal of the uterine content. Thus, Dr. Ben-Ozer's notes also do not support her contention that she obtained Donna's consent to remove her Fallopian tubes.

10. It is the usual practice in this community and, therefore, part of the requisite standard of care, for doctors to put procedures in place to ensure that a patient is sufficiently informed about the details, risks, and scope of any anticipated surgery. On a more basic level, doctors must, and in this community generally do, have procedures and safeguards in place to ensure that they have the patient's permission to perform the surgical procedure. Most doctors, myself included, have their own office written consent forms that they discuss and complete with patients prior to surgery. This form is the primary consent form, and is only supplemented by the hospital consent form which is completed by the patient along with hospital staff just prior to the surgery.

11. My own practice of obtaining informed consent from my private patients in a case such as Ms. Head's would be as follows:

a. I would discuss the details of any proposed surgical procedure, including the reasons for the procedure, the nature

and scope of the procedure, and any potential risks and complications;

b. I would ask the patient to read and sign my office form entitled "Laparoscopy—Informed Consent" (a true and correct copy of this form is attached hereto as *Exhibit E*);

c. I would ask the patient to read and sign my office form entitled "Laparotomy—Informed Consent" (a true and correct copy of this form is attached hereto as *Exhibit F*);

d. I would fill out a general consent form to reflect the planned procedure as "video-laparoscopy,[1] possible laparotopmy,[2] salpingostomy[3] (unilateral vs. bilateral),[4] possible salpingecromy[5] (unilateral vs. bilateral), possible laser lysis of adhesions.[6]" I would then ask the patient to read and sign the form and would have all three forms witnessed by a nurse and sometimes a family member *(a* true and correct copy of this form is attached hereto as *Exhibit G*); and

e. I would prepare pre-operative admission orders and would attach all three consent forms as part of the patient's admission orders.

12. It is common knowledge in the medical community that doctors use their own office written consent forms. This is

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[1] A video-laparascopy is a viewing procedure achieved by inserting a "telescope" into the patient's abdomen through the navel.

[2] A laparotomy is an incision made through the abdominal wall, thus exposing the abdominal organs.

[3] A salpingostomy is simply the opening of a Fallopian tube (in this case in order to remove the ectopic pregnancy).

[4] Unilateral v. bilateral means that the procedure might be performed on one or both sides.

[5] A salpingestomy is the surgical removal of a Fallopian tube.

[6] Adhesions are a union of bodily parts by a growth of tissue. A laser lysis of adhesions is a process by which the adhesions are disintegrated with the use of a laser.

particularly so in the field of reproductive medicine where a woman's ability to reproduce in the future is vulnerable. As practicing fertility doctors in this community, Drs. Vermesh and Ben-Ozer are either conscious of these consent practices or have made a conscious effort to avoid ascertaining what standard consent practices are. Their failure to obtain an intra-office written consent before performing a bilateral tubal removal on Ms. Head constitutes a flagrant and conscious disregard of community practice established to protect the rights of patients to make fundamental decisions regarding their own fertility and their own bodies.

13. Another particularly surprising and alarming observation I have made in my review of this matter is the complete lack of pre-operative admitting orders for her November 12, 1997 surgery. Preoperative admission orders provide another opportunity for the physician to verify that the appropriate informed consent has been obtained from the patient. Attached hereto as *Exhibit H* is a true and correct copy of Tarzana Regional Medical Center's Physician's Order Outpatient Surgery form for Ms. Head's surgery. The top half of the form is to be used for the physician's pre-operative admission orders. In Ms. Head's case, the entire top half of the form—including the portion where the specifics of the patient's consent are to be filled in—is completely *blank!* Sometimes physicians submit their own pre-operative orders on a separate form, but after a complete review of Ms. Head's hospital records, I cannot locate such a form. The hospital records are completely devoid of *any* physician pre-operative orders.

14. It is basic standard practice for physicians to complete admission orders for all patients they admit to a hospital for surgery. Further, Ms. Head's surgery was performed at Tarzana Regional Medical Center where I am also a staff physician, so I can attest that it is the practice of physicians operating at Tarzana to submit admitting orders. The failure

of Drs. Vermesh and Ben-Ozer to complete any patient admission orders for Ms. Head's November 12, 1997 surgery also fell well below the community standard.

15. The standard of practice in this community additionally requires that a woman's written consent be obtained before her eggs or embryos are discarded. Consent is required regardless of the stage of development. Here, Drs. Vermesh and Ben-Ozer also failed to obtain Ms. Head's consent, written or otherwise, for the disposal of three fertilized eggs. Such failure also fell well below the applicable standard of care.

16. The only consent form in Ms. Head's medical records that addresses the handling of her eggs is the Center for Reproductive Medicine's "Consent Form for Procedures Involved in In Vitro Fertilization and Pre-Embryo Replacement." This form indicates that the patient's eggs (oocytes) may be used in one of only three listed ways:

- the eggs may be combined with sperm in the laboratory and immediately transferred into the patient;
- the eggs may be combined with, sperm in the laboratory, examined for fertilization and, if embryonic development takes place, the "pre-embryos" may be then be transferred into the patient; or
- the eggs may be combined with sperm, fertilized, and then frozen for later use.

The form further indicates that embryos will be frozen and stored if the patient requests. The form specifically states: "We understand that if we request spermatozoa to be added to more oocytes than the number of pre-embryos we want replaced in this cycle of treatment, that any excess pre-embryos may be cryopreserved [frozen] for our future use."

17. Importantly, embryos can be frozen at any stage of development. Consequently, the laboratory form used for Ms. Head's embryo transfer procedure has a line for the technician

to indicate at what stage any embryos are frozen, (A copy of this form is attached hereto as *Exhibit I* for ease of reference.) There is no mention in the consent form that embryos will be monitored for a period of time to determine whether they reach the blastocyst stage and then be automatically discarded if they do not. Rather, the consent form simply states that unused embryos will be frozen if the patient wishes.

18. There is evidence in this case regarding the potential mishandling of Ms, Head's unused embryos that I find quite disturbing and possibly reminiscent of the Irvine situation—there are at least three (3) embryos unaccounted for. The Post Embryo Transfer Instructions from Ms. Head's embryo transfer procedure indicate that 14 of the 19 eggs retrieved were fertilized. (Ben-Ozer Depo., Exh. I.) Ms. Head and her husband were told that seven (7) of these fertilized eggs reached a developmental stage appropriate for transfer to Ms, Head. (Head Depo., 97:3-22.) The Heads decided to use only four (4) of the seven (7) available embryos in order to minimize the risk of multiple births. (Head Depo., 97:3-22.) Ms. Head was told by Dr. Ben-Ozer that there were three (3) embryos remaining after the transfer procedure that had reached the blastocyst stage and that these embryos had been frozen and stored. (Head Depo., 51:23-53:11.) However, when Ms. Head went to see Dr. Vermesh several days after her tubes were removed (only one month after the embryo transfer), Dr.. Vermesh could not account for the three (3) remaining embryos, barely one month after Ms. Head's embryo transfer procedure. (Head Depo., 51:15-22.)

19. A note on the laboratory report from Ms. Head's embryo transfer procedure appears to state: "embs discarded did not reach blast," suggesting that some embryos did not reach the blastocyst stage. However, there is no number of allegedly discarded embryos reflected on this form. More fundamentally, this notation contradicts what Ms. Head was

told—that she had three remaining embryos that had reached the blastocyst stage.

20. Even if it were the case, as Defendants contend, that none of the embryos actually did reach the blastocyst stage, there is no assertion in the doctors' declarations or deposition testimony that they obtained Ms. Head's oral permission to dispose of her remaining embryos. Indeed, both doctors testified that they have no memory of the egg retrieval or embryo transfer procedures, and are relying only on, the medical records to determine what occurred.

21. It is fundamental and basic that the disposal of fertilized eggs or embryos at any developmental stage must be consented to, in writing, by the patient. A doctor's failure to obtain a woman's consent to dispose of her embryos at any stage Of development is clearly below the standard of care. The doctors' failure to obtain Ms. Head's permission, let alone informed consent, to dispose of her remaining embryos constituted an egregious breach of their duty to Ms. Head, falling well below the standard of care they owed her.

I declare under penalty of perjury under the laws of die State of California That the foregoing is true and correct.

Executed this 28th day of June, 2000, at Los Angeles California.

/s/ Gil N. Mileikowsky,
GIL N. MILEIKOWSKY, M.D.

APPENDIX M

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

[Filed Nov. 2, 2002]

CASE NO. BS079131

GIL N. MILEIKOWSKY, M.D.
Petitioner,

v.

TENET HEALTHSYSTEM, ENCINO TARZANA REGIONAL MEDICAL CENTER, a California corporation and DOES 1 through 100 inclusive,
Respondents.

FIRST AMENDED PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1094.5 AND TRADITIONAL MANDAMUS UNDER CODE OF CIVIL PROCEDURE SECTION 1085

This is a Petition for Writ of Administrative Mandamus and Traditional Mandamus to review and challenge the decision of the appellate review body of Respondent Tenet Healthsystem, Encino-Tarzana Regional Medical Center, a California corporation of July 25, 2002 which affirmed the decision of hearing officer Daniel H. Willick of March 30, 2002 illegally aborting a judicial review committee hearing regarding the denial of Petitioner's reappointment application and suspending Petitioner's staff privileges. Petitioner alleges as follows:

* * *

decision on the merits. This Court is in a position to review the limited record already made before Willick prematurely aborted the "hearing." The evidence already demonstrated that there was no basis for the summary suspension.

45. Petitioner also requests that this Honorable Court retain jurisdiction to award damages pursuant to Code of Civil Procedure Section 1095.

46. Petitioner has been compelled to retain attorneys to assist and/or represent him in these proceedings. Upon the successful conclusion of this case Petitioner will seek an award of attorney's fees.

SECOND CAUSE OF ACTION:
ADMINISTRATIVE MANDAMUS

47. Petitioner incorporates by reference Paragraphs 1 through 46 of his First Cause of Action.

WEREFORE, PETITIONER PRAYS FOR JUDGMENT AS FOLLOWS:

1. That a peremptory writ of administrative mandamus and writ of mandate issue under the seal of this Court directing Respondent to complete his Judicial Review Committee hearing and exhaust his administrative remedies within 30 days before an administrative law judge at the Office of Administrative Hearings, without any security guards and allow Petitioner to be represented at the hearing by an attorney as Tarzana's By-Laws do not allow Petitioner to be represented by an attorney at a hearing.

2. For a writ of administrative mandate and mandamus compelling Respondent to set aside its order denying Petitioner's reappointment application and an order directing Respondent to set aside its summary

* * *

MOTION FILED
DEC 19 2005

No. 05-638

IN THE

Supreme Court of the United States

GIL N. MILEIKOWSKY, M.D.,
Petitioner,

–against–

TENET HEALTHSYSTEM, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION FOUR

MOTION TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF THE *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO A FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the associations listed below respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the Petition for a Writ of Certiorari submitted by Dr. Gil Mileikowsky. Respondent Tenet Healthsystems ("Tenet") has refused to grant consent, offering no explanation, and necessitating this motion.

The following *amici curiae* have a substantial interest in this Court's review under a writ of certiorari:

- the Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943, dedicated to defending the patient-physician relationship and free enterprise in medicine;

- the Union of American Physicians and Dentists ("UAPD") is an association of thousands of physicians and dentists, headquartered in California where the bulk of its members live and practice medicine, whose history of advocacy embraces concerns that doctors be accorded due process in tribunal proceedings;

- the Semmelweis Society International, Inc. ("Semmelweis Society") is a public interest group comprising approximately eighty physicians, attorneys and concerned citizens who advocate for good faith professional peer review in medicine;

- the Government Accountability Project ("GAP") is a 28-year-old non-profit, non-partisan public interest law firm specializing in legal advocacy to protect government and

a 28-year-old non-profit, non-partisan public interest law firm specializing in legal advocacy to protect government and corporate "whistleblowers" who expose institutional misconduct that undermines the public interest. The Consumer Attorneys of California ("CAOC") is an organization of more than 3,000 attorneys who individually advocate on behalf of consumer and plaintiffs who have been wrongly injured through negligence or defective products and lack the resources and power to face corporate wrongdoers. The Association of Trial Lawyers in America ("ATLA") is a voluntary association of approximately 50,000 lawyers, is committed to protecting the fundamental fairness of adjudicatory proceedings.

These *amici* groups have a vital interest in this matter as it addresses the integrity of peer review proceedings – highly legal in nature – in which doctors are called to defend themselves, without counsel, often, as in this case, after calling attention to a situation of improper, inadequate or dangerous medical care. This case implicates not only the capacity of individual physicians to defend themselves against retaliatory action when they stand up for the very oath by which they practice, but further goes to the very heart of the national public interest in preserving transparency and accountability within the complex managed health care system that patients cannot monitor on their own. The American public, as medical patients, will be the biggest loser if physicians are compelled to choose between their own livelihoods and speaking out on behalf of wronged patients. Whenever fewer physicians are willing to criticize the medical community out of fear of the dire consequences of a fundamentally unfair, bad faith peer review, an essential prong in the checks and balances integral to a successful health care program will be silenced.

Review Protection Statutes Have Helped Protect Bad Faith Peer Review In The Medical Community, 18 J. of Contemp. Health Law & Policy 239, 239-40 (2001).

This case is of particular interest, therefore, because it implicates not only the capacity of individual physicians to defend themselves against retaliatory action when they stand up for the very oath by which they practice, but further goes to the very heart of the national public interest in preserving transparency and accountability within the complex managed health care system that patients cannot monitor on their own. The American public, as medical patients, will be the biggest loser if physicians are compelled to choose between their own livelihoods and speaking out when they witness dangerous or inadequate medical care. Few physicians will risk the dire consequences of a bad faith peer review to speak up on behalf of a single patient, and a critical prong in the checks and balances integral to a successful health care program will be silenced.

For the above reasons, this motion for leave to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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*COUNSEL OF RECORD

QUESTIONS PRESENTED

Whether California violated the Due Process Clause when it denied a physician the right to counsel at a retaliatory suspension hearing which resulted in the loss of hospital privileges and which is required to be reported to the National Practitioner Data Bank pursuant to the Health Care Quality Improvement Act of 1986.

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INTEREST OF *AMICI CURIAE*[1]

The Association of American Physicians & Surgeons, Inc. ("AAPS") is a non-profit, national group of thousands of physicians founded in 1943, dedicated to defending the patient-physician relationship and free enterprise in medicine. The Union of American Physicians and Dentists ("UAPD") is an association of thousands of physicians and dentists, headquartered in California where the bulk of its members live and practice medicine, whose history of advocacy embraces concerns that doctors be accorded due process in tribunal proceedings. The Semmelweis Society International, Inc. ("Semmelweis Society") is a public interest group comprising approximately eighty physicians, attorneys and concerned citizens who advocate for good faith professional peer review in medicine.[2] The Government Accountability Project ("GAP") is

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[1] Pursuant to Rule 37.6 of the Supreme Court of the United States, counsel for *amici curiae* authored the brief in whole. No monetary contribution was received toward preparation or submission of the brief, other than monetary contributions by *amici curiae*.

[2] The Semmelweis Society is named for the Hungarian physician Dr. Ignas Semmelweis who discovered in 1847 that doctors in Vienna hospitals were spreading fatal infectious diseases while delivering babies. He required that all doctors under his supervision wash their hands before touching patients.

Dr. Semmelweis' observations were originally rejected by his peers and the controversy over his views resulted in Dr. Semmelweis ultimately suffering a break down. He was taken to a mental hospital where he died. As a result of Dr. Semmelweis' actions, all physicians now use antiseptics. Yann H.H. Geertruyden, The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 And State Peer

corporate "whistleblowers" who expose institutional misconduct that undermines the public interest;

GAP works to see that whistleblowing is honored and rewarded. When, as in this case, institutions seeks to punish whistleblowing, GAP defends the rights of the whistleblower. The reason for this is simple: If there is a penalty for exposing wrongdoing, people are much less likely to expose it. This is detrimental to the public in very direct ways. In this case, other medical practitioners are discouraged from coming forward when they are aware of problems or negligence in patient care. This chilling effect in directly detrimental to the public well-being. Therefore, we pray to be heard in this case.

- the Consumer Attorneys of California ("CAOC") is an organization of more than 3,000 attorneys who individually advocate on behalf of consumer and plaintiffs who have been wrongly injured through negligence or defective products and lack the resources and power to face corporate wrongdoers; and

- the Association of Trial Lawyers in America ("ATLA") is a voluntary association of approximately 50,000 lawyers, is committed to protecting the fundamental fairness of adjudicatory proceedings.

The interest of the foregoing *amici* groups in Dr. Mileikowsky's petition for certiorari stems from their dedication to preserving the integrity of proceedings conducted by administrative tribunals, and to ensuring that due process rights are provided when physicians face peer review procedures. This case addresses the integrity of those procedures, which are quasi-criminal in nature. Doctors, like the petitioner in this case, are required to defend themselves without counsel against charges that, as in this case, have been brought in retaliation for the doctor's support of a patient claiming inadequate care.

SUMMARY OF ARGUMENT

On June 19, 2000, a plaintiff suing Encino-Tarzana Regional Medical Center (the "Hospital") and two of the doctors on its staff, identified petitioner Gil Mileikowsky, M.D. as her expert witness. Dr. Mileikowsky intended to testify that the Hospital's doctors performed a surgical procedure on the plaintiff – the removal of her fallopian tubes – without her informed consent, that the plaintiff's eggs and embryos were improperly stored and/or destroyed, and that the treatment of the plaintiff fell below the required standard of care.

Just four days later, the Hospital notified Dr. Mileikowsky that special security monitoring provisions were being implemented against him requiring that security personnel accompany him whenever he was on Hospital premises.

This was just the opening salvo in the Hospital's efforts to retaliate against Dr. Mileikowsky for daring to publicly take a stand opposing its treatment of a patient. A few months later, Dr. Mileikowsky's clinical privileges were summarily suspended based on trivial and dated allegations of misconduct, virtually all of which were unrelated to patient care, and which, but for his "whistleblowing," would never have become the basis for a peer review hearing.

Under California law – which directly contravenes federal law – a doctor who is facing suspension of his privileges is not entitled to the representation of counsel, even if he can afford one. His adversary, the hearing officer, may be a trained lawyer, as he was in this case. Indeed, here, he was a former counsel to the hospital itself. Without the benefit of counsel, the doctor must participate in an extraordinarily complex quasi-judicial procedure that includes discovery, the production of exhibits and witness lists, the filing of briefs, and "voir dire" of the physicians who will sit in judgment as members of the peer review panel.